DOCUMENT RESUME

ED 469 640 IR 058 487

TITLE	DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to [Section] 104 of the Digital Millennium Copyright Act.
INSTITUTION	Library of Congress, Washington, DC. Copyright Office.
PUB DATE	2001-08-00
NOTE	1105p.; Report required under the Digital Millennium Copyright Act of 1998, [Section] 104, Public Law No. 105-304, 112 Stat. 2860, 2876.
AVAILABLE FROM	For full text: http://www.copyright.gov/reports/ studies/dmca/dmca_study.html.
PUB TYPE	Reports - Evaluative (142)
EDRS PRICE	EDRS Price MF08/PC45 Plus Postage.
DESCRIPTORS	*Copyrights; *Electronic Publishing; *Federal Legislation; Information Policy; Information Technology; Intellectual Property; *Laws; Ownership; Public Policy
IDENTIFIERS	*Copyright Office; *Digital Millennium Copyright Act 1998; Digital Technology

ABSTRACT

As required under section 104 of Public Law No. 105-304, this Report evaluates the effects of title I of the Digital Millennium Copyright Act (DMCA) of 1998 and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, U.S.C. It also evaluates the relationship between existing and emergent technology and the operation of those sections. Specifically, this Report focuses on three proposals that were put forward during consultations with the public: creation of a "digital first sale doctrine"; creation of an exemption for the making of certain temporary incidental copies; and the expansion of the archival copying exemption for computer programs in section 117 of the Act. Part I of this Report describes the circumstances leading up to the enactment of the DMCA and the genesis of this study. Part I also examines the historical basis of sections 109 and 117 of the Act. Part II discusses the wide range of views expressed in the public comments and testimony. This input from the public, academic, libraries, copyright organizations, and copyright owners formed the core information considered by the Office in its evaluation and recommendations. Part III evaluates the effect of title I of the DMCA and the development of electronic commerce and associated technology on the operations of sections 109 and 117 in light of the information received and states conclusions and recommendations regarding the advisability of statutory change. Appendixes include: Federal Register Notices (June 5, 2000 and October 24, 2000); index of initial comments filed in response to 65 FR 35673 and index of reply comments (in order received by Copyright Office); and Schedule of Witnesses for the Joint Study on 17 U.S.C. Sections 109 and 117 required pursuant to DMCA Section 104 (Public Hearing, November 29, 2000). (AEF)

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DMCA
Section 104 Report

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U.S. Copyright Office
August 2001

A Report of the Register of Copyrights
Pursuant to §104 of the Digital Millennium Copyright Act

IR058487

DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, § 104

Pub. L. No. 105-304, 112 Stat. 2860, 2876

SEC. 104. EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT.

(a) EVALUATION BY THE REGISTER OF COPYRIGHTS AND THE ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION.–The Register of Copyrights and Assistant Secretary for Communications and Information of the Department of Commerce shall jointly evaluate–

> (1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and
>
> (2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

(b) REPORT TO CONGRESS.–The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall, not later than 24 months after the date of the enactment of this Act, submit to the Congress a joint report on the evaluation conducted under subsection (a), including any legislative recommendations the Register and the Assistant Secretary may have.

DMCA
Section 104 Report
U.S. Copyright Office
August 2001

A Report of the
Register of Copyrights
Pursuant to §104 of the Digital
Millennium Copyright Act

Library of Congress Cataloging-in-Publication Data

Library of Congress. Copyright Office.
DMCA section 104 report a report of the Register of Copyrights pursuant to [section] 104 of the Digital Millennium Copyright Act.
p. cm.
1. United States. Digital Millennium Copyright Act. 2. Copyright--Electronic information resources--United States--Legislative history. 3. Copyright and electronic data processing--United States--Legislative history. I. Title.
KF2989.573.A15 2001
346.7304'82--dc21

2001042373

★ 8-29-01

The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

August 29, 2001

Dear Mr. President:

I am pleased to present the Copyright Office's "DMCA Section 104 Report."

As required under section 104 of Public Law No. 105-304, the Report evaluates the effects of title I of the Digital Millennium Copyright Act of 1998 and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, U.S.C. It also evaluates the relationship between existing and emergent technology and the operation of those sections.

Respectfully,

Marybeth Peters

Marybeth Peters
Register of Copyrights

Enclosure

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

August 29, 2001

Dear Mr. Speaker:

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Respectfully,

Marybeth Peters

Marybeth Peters
Register of Copyrights

Enclosure

The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
Washington, D.C. 20515

ACKNOWLEDGMENTS

This report is the result of the expertise, skills and dedication of many people. I was fortunate to be able to draw on many talented staff, and I am grateful to all of them. However, I especially thank and acknowledge the efforts of two officials of the Office. The first is Jesse Feder, Acting Associate Register for Policy and International Affairs, who served as the project manager and who was also a primary drafter of the report; the second is David O. Carson, General Counsel of the Copyright Office, whose wise counsel and sound advice was present throughout the process. Also, worthy of special praise are the others who drafted the report; they are Marla Poor, Attorney Advisor, Office of Policy and International Affairs, Steven Tepp, Policy Planning Advisor, Office of Policy and International Affairs, and Robert Kasunic, Senior Attorney-Advisor, Office of the Copyright General Counsel. Their efforts went well beyond writing sections of the report and they played important roles in the review process.

Others in the Office assisted the "report team" in numerous ways, including sharing their insight and advice. These individuals are Robert Dizard, Staff Director and Chief Operating Officer of the Copyright Office, Tanya Sandros, Senior Attorney, Office of the Copyright General Counsel; William Roberts Senior Attorney-Advisor for Compulsory Licenses, Office of the Copyright General Counsel; and Sayuri Rajapakse, Attorney-Advisor, Office of Policy and International Affairs. I also thank Kelly Lacey, our intern from Georgetown University Law Center, for her first-rate substantive help.

Numerous and important contributions were made by many others in the Copyright Office. I thank, Marylyn Martin of the Register's Office, for her assistance in organizing our public hearing; Shirada Harrison of the Office of Policy and International Affairs, and Guy Echols and Sandra Jones of the General Counsel's Office for their assistance in completing the final document; Helen Hester-Ossa, Teresa McCall and Charles Gibbons of the Information and Reference Division for their excellent assistance in the design and layout of the Report and in getting it printed; Denise Prince of the General Counsel's Office for her assistance in getting it delivered to Congress; and Ed Rogers and George Thuronyi, our webmasters, for their expert contributions both during the study and in getting our Report out to the public via the Internet. Special thanks also to Xue Fei Li of our Automation Group for her technical assistance in receiving comments from the public by email.

Finally, just prior to completing the process, I asked June Besek, Director of Studies and Director of the International Program of the Kernochan Center for Law, Media and the Arts at Columbia Law School, to review the penultimate draft text. I appreciate her exceptional efforts (she had less than 48 hours) and her invaluable suggestions and comments.

Marybeth Peters
Register of Copyrights

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EXECUTIVE SUMMARY

INTRODUCTION

The Digital Millennium Copyright Act of 1998 (DMCA) was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation's copyright law into the digital age. But as Congress recognized, the only thing that remains constant is change. The enactment of the DMCA was only the beginning of an ongoing evaluation by Congress on the relationship between technological change and U.S. copyright law. This Report of the Register of Copyrights was mandated in the DMCA to assist Congress in that continuing process.

Our mandate was to evaluate "the effects of the amendments made by [title I of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title17, United States Code; and the relationship between existing and emergent technology and the operation of sections 109 and 117. . . ." Specifically, this Report focuses on three proposals that were put forward during our consultations with the public: creation of a "digital first sale doctrine;" creation of an exemption for the making of certain temporary incidental copies; and the expansion of the archival copying exemption for computer programs in section 117 of the Act.

Part I of this Report describes the circumstances leading up to the enactment of the DMCA and the genesis of this study. Part I also examines the historical basis of sections 109 and

117 of the Act. Part II discusses the wide range of views expressed in the public comments and testimony. This input from the public, academia, libraries, copyright organizations and copyright owners formed the core information considered by the Office in its evaluation and recommendations. Part III evaluates the effect of title I of the DMCA and the development of electronic commerce and associated technology on the operations of sections 109 and 117 in light of the information received and states our conclusions and recommendations regarding the advisability of statutory change.

I. BACKGROUND

A. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The World Intellectual Property Organization (WIPO) treaties were the impetus for the U.S. legislation. In order to facilitate the development of electronic commerce in the digital age, Congress implemented the WIPO treaties by enacting legislation to address those treaty obligations that were not adequately addressed under existing U.S. law. Legal prohibitions against circumvention of technological protection measures employed by copyright owners to protect their works, and against the removal or alteration of copyright management information, were required in order to implement U.S. treaty obligations.

The congressional determination to promote electronic commerce and the distribution of digital works by providing copyright owners with legal tools to prevent widespread piracy was tempered with concern for maintaining the integrity of the statutory limitations on the exclusive rights of copyright owners. In addition to the provisions adopted by Congress in 1998, there were other proposals – including amendments to sections 109 and 117, that were not adopted, but were the subjects of a number of studies mandated by the DMCA. Section 104 of the DMCA requires the Register of Copyrights and the Assistant Secretary for Communications and Information to report on the effects of the DMCA on the operation of sections 109 and 117 and the relationship between existing and emergent technology on the operation of sections 109 and 117 of title 17 of the United States Code.

The inclusion of section 109 in the study has a clear relationship to the digital first sale proposal contained in a bill introduced in 1997 by Congressmen Rick Boucher and Tom Campbell. The reasons for including section 117 in the study are less obvious. While there is no legislative history explaining why section 117 is included in the study, it appears that the reference was intended to include within the scope of the study a proposed exemption for incidental copies found in the Boucher-Campbell bill, which would have been codified in section 117 of the Copyright Act.

B. SECTION 109(a) AND THE FIRST SALE DOCTRINE

The common-law roots of the first sale doctrine allowed the owner of a particular copy of a work to dispose of that copy. This judicial doctrine was grounded in the common-law principle that restraints on the alienation of tangible property are to be avoided in the absence of clear congressional intent to abrogate this principle. This doctrine appears in section 109 of the Copyright Act of 1976. Section 109(a) specified that this notwithstanding a copyright owner's exclusive distribution right under section 106 the owner of a particular copy or phonorecord that was lawfully made under title 17 is entitled to sell or further dispose of the possession of that copy or phonorecord.

C. SECTION 117 COMPUTER PROGRAM EXEMPTIONS

Section 117 of the Copyright Act of 1976 was enacted in the Computer Software Copyright Amendments of 1980 in response to the recommendations of the National Commission on New Technological Uses of Copyrighted Works' (CONTU). Section 117 permits the owner of a copy of a computer program to make an additional copy of the program for purely archival purposes if all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful, or where the making of such a copy is an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.

II. VIEWS OF THE PUBLIC

Section II of the report summarizes the views received from the public through comments, reply comments and hearing testimony. The summaries are grouped into three categories: views concerning section 109, views concerning section 117, and views on other miscellaneous issues.

A. VIEWS CONCERNING SECTION 109

Most of the comments dealt with section 109 whether or not they addressed section 117. While there was a broad range of views on the effect of the DMCA on the first sale doctrine, most of the commenters believed that the anticircumvention provisions of 17 U.S.C. section 1201 allowed copyright owners to restrict the operation of section 109. Of particular concern to many commenters was the Content Scrambling System (CSS) and the "region coding" used to protect motion pictures on Digital Versatile Disks (DVDs). They argued that use of CSS forces a consumer to make two purchases in order to view a motion picture on DVD: the DVD and the authorized decryption device. In the view of these commenters, this system reduces or eliminates the value of and market for DVDs by interfering with their free alienability on the market. A similar argument was advanced for the region coding on DVDs in that the geographic market for resale is restricted by this technological protection measure.

Another concern expressed by a number of commenters was the growing use of non-negotiable licenses accompanying copyrighted works that are written to restrict or eliminate statutorily permitted uses, including uses permitted under section 109. In some cases, these license restrictions are enforced through technological measures. It was argued that these licensing practices and the prohibition on circumvention frustrate the goals of the first sale doctrine by allowing copyright owners to maintain control on works beyond the first sale of a particular copy. These commenters stated that this interference with the operation of the first sale doctrine has the capacity to inhibit the function of traditional library operations, such as interlibrary loan, preservation, and use of donated copies of works.

Other commenters rebutted these claims, arguing that over-restrictive technological protection measures or licenses would not survive in the marketplace, since competition would be a limiting principle. It was also argued that the effect of licensing terms on the first sale doctrine is beyond the scope of this study.

Commenters generally viewed section 1202 of the DMCA, which prohibits the alteration or removal of copyright management information, as having no impact of the operation of the first sale doctrine.

The greatest area of contention in the comments was the question of whether to expand the first sale doctrine to permit digital transmission of lawfully made copies of works. Although some proponents argued that such transmissions are already permitted by the current language of section 109, most thought that clarification of this conclusion by Congress would be advisable since the absence of express statutory language could lead to uncertainty.

The proponents of revising section 109 argued that the transmission of a work that was subsequently deleted from the sender's computer is the digital equivalent of giving, lending, or selling a book. Allowing consumers to transfer the copy of the work efficiently by means of online transmission would foster the principles of the first sale doctrine. These principles have promoted economic growth and creativity in the analog world and should be extended to the digital environment. Proponents of this argument sought amendment to section 109 to allow a person to forward a work over the Internet and then delete that work from his computer.

Others opposed such an amendment for a number of reasons. Opponents pointed out that the first sale doctrine is a limitation on the distribution right of copyright owners and has never implicated the reproduction right which is, in their view, a "cornerstone" of copyright protection. In addition, the impact of the doctrine on copyright owners was also limited in the off-line world by a number of factors, including geography and the gradual degradation of books and analog works. The absence of such limitations would have an adverse effect on the market for digital works. Opponents also believed that proposals that depend on the user deleting his copy would be unverifiable, leading to virtually undetectable cheating. Given the expanding market for digital works without a digital first sale doctrine, opponents questioned the consumer demand for such a change in the law.

B. VIEWS CONCERNING SECTION 117

The comments related to section 117 fell into two main categories: those addressing the status of temporary copies in RAM and those concerning the scope of the archival exemption.

Many commenters advocated a blanket exemption for temporary copies that are incidental to the operation of a device in the course of use of a work when that use is lawful under title 17. Such an exemption was originally proposed in the Boucher-Campbell bill as an amendment to section 117.

Other commenters vigorously opposed any exemption for incidental copies at this time. They argued that such an exemption would dramatically expand the scope of section 117 in contrast to the carefully calibrated adjustment made to section 117 in the DMCA to address the problems experienced by independent computer service organizations at issue in *MAI Systems Corp. v. Peak Computer, Inc.* These commenters stated that Congress' narrow adjustment to section 117 in the DMCA reaffirmed the conclusion that temporary copies in random access memory (RAM) are copies that are subject to the copyright owner's exclusive reproduction right. Further change would undercut the reproduction right in all works and endanger international treaty obligations.

There was disagreement on the economic value of temporary copies. Proponents of an amendment argued that temporary buffer copies are necessary to carry out streaming of performances of works on the Internet and have no value apart from that performance. They argued that the limitations under other sections of the Copyright Act, including sections 107 and 512, were insufficient to sustain the operation of businesses that stream audio performances to the public.

Opponents, on the other hand, argued that these copies are within the scope of the copyright owner's exclusive rights and do possess value. Particular emphasis was placed on the value of temporary copies of computer programs. It was also argued that as streaming performances become more common, these temporary copies will increase in value because of the adverse effect of the performances on the market for purchases of copies of these works. Opponents believed it would be premature to change the law because of the absence of specific evidence of harm and the high potential for adverse unintended consequences. It was noted that when Congress was presented with concrete evidence of harm to independent service organizations after the *MAI v. Peak* decision, Congress took steps to remedy the situation. Similarly, section 512 of the DMCA created limitations on the remedies available against Internet service providers for incidental copying that is essential to the operation of the Internet.

The other major concern involving section 117 concerned the scope of the archival exemption. Proponents of amending section 117 raised two primary points. First, they argued that the policy behind the archival exemption needs to be updated to encompass all digital works rather than just computer programs. Since computers are vulnerable to crashes, viruses, and other failures, downloaded music, electronic books and other works face the same risks that precipitated the exemption for computer programs. Some argued that all digital media is susceptible to accidental deletion or corruption. Consumers should be permitted to protect their investments in works.

Proponents of expansion of the archival exemption offered another argument – section 117 does not comport with reality. Systematic backup practices do not fit the structure of section 117, which is limited to making a copy of an individual program at the time the consumer obtains it. It was argued that such a discrepancy between the law and commonly accepted practices undermines the integrity of the law. Such a fundamental mismatch creates the perception that the law need not be literally followed, thereby creating a slippery slope.

Opponents of an expansion of the archival exemption countered that the justification behind section 117 no longer exists. Most software is distributed on CD-ROM, which is far more robust than floppy disks. Consumers need merely retain the original CD as a backup, since it is a simple operation to reinstall software that is compromised. In addition, these opponents argued that there is currently an inaccurate public perception of the scope of the backup copy exception. These commenters argue that many invoke the archival exception as a shield to commercial piracy.

Opponents of an amendment to section 117 asserted that even if there is a mismatch between actual backup practices and the current exception, no one has been harmed by it. Commenters noted that no one has been sued as a result of backing up material outside the scope of section 117, and no one has stopped performing backups. It was also argued that if a particular activity does not fall within the terms of section 117, it may nevertheless be privileged under the fair use doctrine.

C. VIEWS CONCERNING OTHER MISCELLANEOUS ISSUES

There were assorted other comments and testimony on a range of issues. There were concerns raised about the potential adverse effects of sections 1201 and 1202 on the traditional concepts of first sale, fair use, and the archival and preservation exemptions. It was argued that these prohibitions are likely to diminish, if not eliminate, otherwise lawful uses. It was asserted that copyright management information may also have the capacity to reveal user information in a manner that would chill legitimate uses of copyrighted works.

Another prevalent concern was that licenses are being used increasingly by copyright owners to undermine the first sale doctrine and restrict other user privileges under the copyright law. These commenters argue that this trend is displacing the uniformity of federal copyright law with a wide variation of contract terms that must be evaluated and interpreted. This poses a particular challenge to large institutions, such as universities and libraries, in determining legal and acceptable use in any given work. A number of commenters argued that federal copyright law should preempt such license terms.

Other commenters argued that Congress did not intend copyright law broadly to preempt contract provisions. They argue that the freedom to contract serves the interests on both copyright owners and the public by allowing greater flexibility in determining pricing, terms and conditions of use, and other options.

III. EVALUATION AND RECOMMENDATIONS

We are not persuaded that title I of the DMCA has had a significant effect on the operation of sections 109 and 117 of title 17. The adverse effects that section 1201, for example, is alleged to have had on these sections cannot accurately be ascribed to section 1201. The causal relationship between the problems identified and section 1201 are currently either minimal or easily attributable to other factors such as the increasing use of license terms. Accordingly, none of our legislative recommendations are based on the effects of section 1201 on the operation of sections 109 and 117.

A. THE EFFECT OF TITLE I OF THE DMCA ON THE OPERATION OF SECTIONS 109 AND 117

The arguments raised concerning the adverse effects of the CSS technological protection measure on the operation of section 109 are flawed. The first sale doctrine is primarily a limitation on copyright owner's distribution right. Section 109 does not guarantee the existence of secondary markets for works. There are many factors which could affect the resale market for works, none of which could be said to interfere with the operation of section 109. The need for a particular device on which to view the work is not a novel concept and does not constitute an effect on section 109. VHS videocassettes for example, must be played on VHS VCRs.

A plausible argument can be made that section 1201 may have a negative effect on the operation of the first sale doctrine in the context of works tethered to a particular device. In the case of tethered works, even if the work is on removable media, the content cannot be accessed on any device other than the one on which it was originally made. This process effectively prevents disposition of the work. However, the practice of tethering a copy of a work to a particular hardware device does not appear to be widespread at this time, at least outside the context of electronic books. Given the relative infancy of digital rights management, it is premature to consider any legislative change at this time. Should this practice become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers is unclear.

We also find that the use of technological measures that prevent the copying of a work potentially could have a negative effect on the operation of section 117. To the extent that a technological measure prohibits access to a copyrighted work, the prohibition on the circumvention of measures that protect access in section 1201(a)(1) may have an adverse impact on the operation of the archival exception in section 117. Again, however, the current impact of such a concern appears to be minimal, since licenses generally define the scope of permissible archiving of software, and the use of CD-ROM reduces the need to make backup copies.

Given the minimal adverse impact at the present time, we conclude that no legislative change is warranted to mitigate any effect of section 1201 on section 117.

B. THE EFFECT OF ELECTRONIC COMMERCE AND TECHNOLOGICAL CHANGE ON SECTIONS 109 AND 117

There is no dispute that section 109 applies to works in digital form. Physical copies of works in a digital format, such as CDs or DVDs, are subject to section 109 in the same way as physical copies in analog form. Similarly, a lawfully made tangible copy of a digitally downloaded work, such as a work downloaded to a floppy disk, Zip™ disk, or CD-RW, is clearly subject to section 109. The question we address here is whether the transmission of a work to another person falls within – or should fall within – the scope of section 109.

1. *The First Sale Doctrine in the Digital World*

a. Evaluation of Arguments Concerning First Sale

The first sale doctrine is primarily a limitation on the copyright owner's exclusive right of distribution. It does not limit the exclusive right of reproduction. While disposition of a work downloaded to a floppy disk would only implicate the distribution right, the transmission of a work from one person to another over the Internet results in a reproduction on the recipient's computer, even if the sender subsequently deletes the original copy of the work. This activity therefore entails an exercise of an exclusive right that is not covered by section 109.

Proponents of expansion of the scope of section 109 to include the transmission and deletion of a digital file argue that this activity is essentially identical to the transfer of a physical copy and that the similarities outweigh the differences. While it is true that there are similarities, we find the analogy to the physical world to be flawed and unconvincing.

Physical copies degrade with time and use; digital information does not. Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost. Digital transmissions can adversely effect the market for the original to a much greater degree than transfers of physical copies. Additionally, unless a "forward-and-delete" technology is employed to automatically delete the sender's copy, the deletion of a work requires an additional affirmative act on the part of the sender subsequent to the transmission. This act is difficult to prove or disprove, as is a person's claim to have transmitted only a single copy, thereby raising complex evidentiary concerns. There were conflicting views on whether effective forward and delete technologies exist today. Even if they do, it is not clear that the market will bear the cost of an expensive technological measure.

The underlying policy of the first sale doctrine as adopted by the courts was to give effect to the common law rule against restraints on the alienation of tangible property. The tangible nature of a copy is a defining element of the first sale doctrine and critical to its rationale. The digital transmission of a work does not implicate the alienability of a physical artifact. When a work is transmitted, the sender is exercising control over the intangible work through its reproduction rather than common law dominion over an item of tangible personal property. Unlike the physical distribution of digital works on a tangible medium, such as a floppy disk, the transmission of works interferes with the copyright owner's control over the intangible work and the exclusive right of reproduction. The benefits to further expansion simply do not outweigh the likelihood of increased harm.

Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers. We are concerned that these proposals for a digital first sale doctrine endeavor to fit the exploitation of works online into a distribution model – the sale of copies – that was developed within the confines of pre-digital technology. If the sale model is to continue as the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.

We also examined how other countries are addressing the applicability of the first sale – or exhaustion – doctrine to digital transmissions. We found that other countries are addressing digital transmissions under the communication to the public right and are not applying the principle of exhaustion, or any other analog thereof, to digital transmissions.

b. Recommendation Concerning the Digital First Sale Doctrine

We recommend no change to section 109 at this time. Although speculative concerns have been raised, there was no convincing evidence of present-day problems. In order to recommend a change in the law, there should be a demonstrated need for the change that outweighs the negative aspects of the proposal. The Copyright Office does not believe that this is the case with the proposal to expand the scope of section 109 to include digital transmissions. The time may come when Congress may wish to address these concerns should they materialize.

The fact that we do not recommend adopting a "digital first sale" provision at this time does not mean that the issues raised by libraries are not potentially valid concerns. Similarly, our conclusion that certain issues are beyond the scope of the present study does not reflect our judgment on the merits of those issues.

The library community has raised concerns about how the current marketing of works in digital form affects libraries with regard to five specifically enumerated categories: interlibrary loans, off-site accessibility, archiving/preservation, availability of works, and use of donated copies. Most of these issues arise from terms and conditions of use, and costs of license agreements. One arises because, when the library has only online access to the work, it lacks a physical copy of the copyrighted work that can be transferred. These issues arise from existing business models and are therefore subject to market forces. We are in the early stages of electronic commerce. We hope and expect that the marketplace will respond to the various concerns of customers in the library community. However, these issues may require further consideration at some point in the future. Libraries serve a vital function in society, and we will continue to work with the library and publishing communities on ways to ensure the continuation of library functions that are critical to our national interest.

2. *The Legal Status of Temporary Copies*

a. RAM Reproductions as "Copies" under the Copyright Act

All of the familiar activities that one performs on a computer, from the execution of a computer program to browsing the World Wide Web, necessarily involve copies stored in integrated circuits known as RAM. This information can remain in memory until the power is switched off or the information is overwritten. These reproductions generally persist only for as long as the particular activity takes place.

The legal status of RAM reproductions has arisen in this study almost exclusively in the context of streaming audio delivery, including webcasting. In order to render the packets of audio information in an audio "stream" smoothly, in spite of inconsistencies in the rate of delivery, packets of audio information are saved in a portion of RAM called a buffer until they are ready to be rendered.

Based on an the text of the Copyright Act – including the definition of "copies" in section 101 – and its legislative history, we conclude that the making of temporary copies of a work in RAM implicates the reproduction right so long as the reproduction persists long enough to be perceived, copied, or communicated.

Every court that has addressed the issue of reproductions in RAM has expressly or impliedly found such reproductions to be copies within the scope of the reproduction right. The seminal case on this subject, *MAI, Sys. Corp. v. Peak Computer, Inc.*, found that the loading of copyrighted software into RAM creates a "copy" of that software. At least nine other courts have followed *MAI v. Peak* in holding RAM reproductions to be "copies" and several other cases have held that loading a computer program into a computer entails making a copy, without mentioning RAM specifically.

b. Evaluation of Arguments Concerning Temporary Incidental Copy Exceptions

In the course of this study, arguments were advanced in support of a blanket exemption for incidental copies similar to that proposed in the Boucher-Campbell bill. Most of the arguments advanced on such a proposal focused exclusively on the specific issue of buffer copies made in the course of audio streaming, rather than the broader issue of incidental copying generally. This focus suggests that legislation tailored to address the specific problems raised in the context of audio streaming should be examined. This focus is particularly appropriate since there was no compelling evidence presented in support of a blanket exemption for incidental copies and there was evidence that such an exemption could lead to unintended adverse consequences for copyright owners.

There was compelling evidence presented, however, on the uncertainty surrounding temporary buffer copies made in RAM in the course of rendering a digital musical stream. Specifically, webcasters asserted that the unknown legal status of buffer copies exposes webcasters to demands for additional royalty payments from the owner of the sound recording, as well as potential infringement liability.

The buffer copies identified by the webcasting industry exist for only a short period of time and consist of small portions of the work. Webcasters argue that these reproductions are incidental to the licensed performance of the work and should not be subject to an additional license for a reproduction that is only a means to an authorized end. Buffer copies implicate the reproduction right, thus potentially resulting in liability. There is, therefore, a legitimate concern on the part of webcasters and other streaming music services as to their potential liability.

We believe that there is a strong case that the making of a buffer copy in the course of streaming is a fair use. Fair use is a defense that may limit any of the copyright owner's exclusive rights, including the reproduction right implicated in temporary copies. In order to assess whether a particular use of the works at issue is a fair use, section 107 requires the consideration and balancing of four mandatory, but nonexclusive, factors on a case-by-case basis.

In examining the first factor – the purpose and character of the use – it appears that the making of buffer copies is commercial and not transformative. However, the use does not supersede or supplant the market for the original works. Buffer copies are a means to a noninfringing and socially beneficial end – the licensed performance of these works. There is no commercial exploitation intended or made of the buffer copy in itself. The first factor weighs in favor of fair use.

The second factor – the nature of the copyrighted work – weighs against a finding of fair use because musical works are generally creative. The third factor – the amount and substantiality of the portion used in relation to the copyrighted work as a whole – would also be likely to weigh against fair use since, in aggregate, an entire musical work is copied in the RAM buffer. Since this is necessary in order to carry out a licensed performance of the work, however, the factor should be of little weight.

In analyzing the fourth factor – the effect of the use on the actual or potential market for the work – the effect appears to be minimal or nonexistent. This factor strongly weighs in favor of fair use.

Two of the four statutory factors weigh in favor of fair use, but fair use is also an "equitable rule of reason." In the case of temporary buffer copies, we believe that the equities unquestionably favor the user. The sole purpose for making the buffer copies is to permit an activity that is licensed by the copyright owner and for which the copyright owner receives a performance royalty. In essence, copyright owners appear to be seeking to be paid twice for the same activity. Additionally, it is technologically necessary to make buffer copies in order to carry out a digital performance of music over the Internet. Finally, the buffer copies exist for too short a period of time to be exploited in any way other than as a narrowly tailored means to enable the authorized performance of the work. On balance, therefore, the equities weigh heavily in favor of fair use.

c. Recommendation Concerning Temporary Incidental Copies

Representatives of the webcasting industry expressed concern that the case-by-case fair use defense is too uncertain a basis for making rational business decisions. We agree. While we recommend against the adoption of a general exemption from the reproduction right to render noninfringing all temporary copies that are incidental to lawful uses, a more carefully tailored approach is desirable.

We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.

The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance of these works. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place – to the detriment of other copyright owners, webcasters and consumers alike – or to extract an additional payment that is not justified by the economic value of the copies at issue. Congressional action is desirable to remove the uncertainty and to allow the activity that Congress sought to encourage through the adoption of the section 114 webcasting compulsory license to take place.

Although we believe that the fair use defense probably does apply to temporary buffer copies, this approach is fraught with uncertain application in the courts. This uncertainty, coupled with the apparent willingness of some copyright owners to assert claims based on the making of buffer copies, argues for statutory change. We believe that the narrowly tailored scope of our recommendation will minimize, if not eliminate, concerns expressed by copyright owners about potential unanticipated consequences.

Given our recommendations concerning temporary copies that are incidental to digital performances of sound recordings and musical works, fairness requires that we acknowledge the symmetrical difficulty that is faced in the online music industry: digital performances that are incidental to digital music downloads. Just as webcasters appear to be facing demands for royalty payments for incidental exercise of the reproduction right in the course of licensed public performances, it appears that companies that sell licensed digital downloads of music are facing demands for public performance royalties for a technical "performance" of the underlying musical work that allegedly occurs in the course of transmitting it from the vendor's server to the consumer's computer.

Although we recognize that it is an unsettled point of law that is subject to debate, we do not endorse the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place. If a court were to find that such a download can be considered a public performance within the language of the Copyright Act, we believe the that arguments concerning fair use and the making of buffer copies are applicable to this performance issue as well. It is our view that no liability should result from a technical "performance" that takes place in the course of a download.

3. *Archival Exemption*

a. Evaluation of Arguments Concerning the Scope of Section 117(a)(2)

Currently the archival exemption under section 117(a)(2) is limited to computer programs. This section allows the owner of a copy of a computer program to make or authorize the making of an additional copy of the program "for archival purposes," provided that "all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful." A number of arguments were advanced in the course of this study for an expansion of this archival exemption in order to cover the kind of routine backups that are performed on computers and to allow consumers to archive material in digital format other than computer programs.

Commenters asserted that consumers need to backup works in digital form because they are vulnerable. That was CONTU's rationale for recommending that Congress create an exemption to permit archival copies of computer programs. In both cases, the vulnerability stems from the digital nature of the works. It would be perfectly consistent with the rationale of CONTU's recommendations and Congress' enactment of section 117 to extend the archival exemption to protect against the vulnerabilities that may afflict all works in digital format.

Evidence was presented to us noting that the archival exemption under section 117 does not permit the prevailing practices and procedures most people and businesses follow for backing up data on a computer hard drive. There is a fundamental mismatch between accepted, prudent practices among most system administrators and other users, on the one hand, and section 117 on the other. As a consequence, few adhere to the law.

While there is no question that this mismatch exists, nobody was able to identify any actual harm to consumers as a result of the limited scope of the archival exemption. Additionally, it was argued that the need to make archival copies of computer programs has diminished, because almost all software sold in the United States is distributed on CD-ROM, which itself serves as an archival copy in the event of hard drive problems or upgrades.

b. Recommendations Concerning the Archival Exemption

Although there has been a complete absence of any demonstrated harm to the prospective beneficiaries of an expanded archival exemption, and although we believe that a strong case could be made that most common archival activities by computer users would qualify as fair use, we have identified a potential concern – the interplay between sections 107 and 109. It appears that the language of the Copyright Act could lead a court to conclude that copies lawfully made under the fair use doctrine may be freely distributed under section 109.

Section 109 permits "the owner of a particular copy or phonorecord lawfully made" under title 17 to distribute that copy without the copyright owner's permission. To the extent that section 107 permits a user to make a backup copy of a work stored on a hard drive, that copy is lawfully made and the user owns it. Section 109, on its face, appears to permit the user to sell or otherwise dispose of the possession of that backup copy. The legislative history can be read to support either view.

We conclude that a statutory change is desirable, and recommend that Congress amend the copyright law in one of two ways.

Given the uncertain state of authority on the issue, we cannot conclude with a satisfactory level of certainty that a court will not, in the future, find a backup copy made by virtue of section 107 to be eligible for distribution under section 109. We believe that such a result is contrary to the intent of Congress and would have the capacity to do serious damage to the copyright owner's market. We therefore recommend that Congress either (1) amend section 109 to ensure that fair use copies are not subject to the first sale doctrine or (2) create a new archival exemption that provides expressly that backup copies may not be distributed. We express no preference as between the two options, and note that they are not mutually exclusive.

The first option would entail amending section 109(a) to state that only copies lawfully made *and lawfully distributed* are subject to the first sale doctrine. This proposed change would not preclude the distribution of copies made pursuant to the fair use doctrine since the exclusive right of distribution is equally subject to the fair use doctrine. It would, however, require that a separate fair use analysis be applied to the distribution of that copy.

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The second option entails creating a new exemption for making backups of lawful copies of material in digital form, and amending section 117 to delete references to archival copies. The new exemption should follow the general contours of section 117(a)(2) and (b), and include the following elements: it should permit the making of one or more backup copies of a work. The copy from which the backup copies are made must be in digital form on a medium that is subject to accidental erasure, damage, or destruction in the ordinary course of its use. It should stipulate that the copies may be made and used solely for archival purposes or for use in lieu of the original copy. It should also specify that, notwithstanding the provisions of section 109, the archival copy may not be transferred except as part of a lawful transfer of all rights in the work. Finally, it should specify that the archival copies may not be used in any manner in the event that continued possession of the work ceases to be rightful.

4. *Contract Preemption*

The question of contract preemption was raised by a number commenters who argued that the Copyright Act should be amended to insure that contract provisions that override consumer privileges in the copyright law, or are otherwise unreasonable, are not enforceable. Although the general issue of contract preemption is outside the scope of this Report, we do note that this issue is complex and of increasing practical importance, and thus legislative action appears to be premature. On the one hand, copyright law has long coexisted with contract law. On the other hand, the movement at the state level toward resolving questions as to the enforceability of non-negotiated contracts coupled with legally-protected technological measures that give right holders the technological capability of imposing contractual provisions unilaterally, increases the possibility that right holders, rather than Congress, will determine the landscape of consumer privileges in the future. Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change.

INTRODUCTION

The Digital Millennium Copyright Act of 1998 (DMCA) was the most substantial revision of the nation's copyright law since the general revision enacted in 1976. What began as a more modest (though critically important) effort to implement two new treaties that addressed issues of copyright in the digital age became a far more comprehensive legislative project to address a range of issues, digital and non-digital. The debates, both inside and outside the Congress, that were generated by this legislation led to myriad proposals – some of which were enacted and some of which were not. As Representative Howard Coble, Chairman of the House Judiciary Subcommittee on Courts and Intellectual Property and one of the bill's chief sponsors in the House, stated when he brought the measure to the floor, the DMCA "is only the beginning of Congress' evaluation of the impact of the digital age on copyrighted works."[1]

The DMCA directed the Register of Copyrights to prepare this Report as part of Congress' continuing evaluation of the impact of the digital age on copyrighted works. It is the fourth such undertaking mandated by Congress in the DMCA. In 1999, the Copyright Office released a report on digital distance education, which included recommendations that are embodied in S. 487 in this Congress.[2] In 2000, the Copyright Office and the National Telecommunications and Information Administration of the Department of Commerce (NTIA) released a joint report on the effect of the prohibition on circumventing access control technologies in section 1201(a)(1)(A) of title 17, and an exception to that prohibition in section 1201(g), on encryption research.[3] Also in 2000, the Office completed a rulemaking required under section 1201(a)(1)(C) concerning an exemption from the section 1201(a)(1)(A) prohibition for noninfringing uses with respect to certain classes of works.

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[1] 144 Cong. Rec. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Coble).

[2] Copyright Office, Copyright Office Report on Copyright and Digital Distance Education (1999). The results of this study were presented to Congress on May 25, 1999 and are available at: www.loc.gov/copyright/docs/de_rprt.pdf. The text of S.487 is available at: thomas.loc.gov/cgi-bin/query/z?c107:S.487:.

The focus of this Report is an evaluation of "the effects of the amendments made by [title I of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and the relationship between existing and emergent technology and the operation of sections 109 and 117 . . . ."[4] It is an outgrowth of proposals that were made contemporaneously with the consideration of the DMCA, but were not adopted in the law. Specifically, this Report focuses on two proposals that were characterized as vital to the continued growth of electronic commerce by their proponents: creation of a digital first sale doctrine to permit certain retransmissions of downloaded copies of works in digital form; and an exemption for certain digital reproductions that are incidental to the use of a copyrighted work in conjunction with a machine. One additional issue that was raised during the preparation of the Report, and appears to fall within the scope set forth by Congress in section 104 of the DMCA, is the appropriate breadth and formulation of the exception for making archival copies of computer programs in section 117.

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[3] The results of that joint Copyright Office and NTIA study were presented to Congress in May 2000 and are available at: www.loc.gov/copyright/reports/studies/dmca_report.html.

[4] DMCA, Pub. L. No. 105-304, § 104(a), 112 Stat. 2860, 2876 (1998).

The DMCA contemplated that, like the report on encryption research, the present effort would be a joint report of the Copyright Office and NTIA. In March 2001, however, NTIA released its own report. This Report, consequently, is exclusively the work of the Copyright Office. All of the views expressed and the recommendations made are, necessarily, solely those of the Register of Copyrights.

I. BACKGROUND

A. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA was "designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."[5] The DMCA grew out of legislation introduced to implement the provisions of two treaties concluded in Geneva, Switzerland in December 1996. These two treaties – which are sometimes referred to as the "Internet Treaties" – updated international copyright norms to account for the advent of digital networks. Title I of the DMCA implements the treaties, "thereby bringing the U.S. copyright law squarely into the digital age and setting a marker for other nations who must also implement these treaties."[6] Congress crafted title I to "protect property rights in the digital world."[7]

1. The WIPO Treaties

On December 20, 1996, at the conclusion of a three-week Diplomatic Conference held in Geneva, Switzerland, headquarters of the World Intellectual Property Organization (WIPO), delegations from 127 countries and the European Commission agreed on the text of two new treaties on copyright and neighboring rights: the WIPO Copyright Treaty (WCT) and the WIPO

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[5] S. Rep. No. 105-190, at 1-2 (1998).

[6] *Id.* at 2.

[7] Staff of House Committee on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 2 (Comm. Print 1998) (Serial No. 6) (hereinafter House Manager's Statement). As the Senate Judiciary Committee noted, "[due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works." S. Rep. No. 105-190, at 8 (1998).

Performances and Phonograms Treaty (WPPT). The Diplomatic Conference was the culmination of a process that began formally in 1991 when a "Committee of Experts" was convened at WIPO to discuss a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works (Berne)[8].

Berne is the principal multilateral agreement for protecting copyrights internationally. Berne establishes minimum levels of protection that all member countries must grant to authors, and requires member countries to grant national treatment to authors from other member countries. The last general revision of Berne took place in 1971. Technological and legal developments during the intervening two decades made updating Berne an imperative in the international copyright community.

In addition, the United States sought to introduce the subject of improved protection for sound recordings into the early Berne Protocol discussions. Rather than incorporating the subject of protection for sound recordings in the Berne Protocol, it was placed on a parallel track that had as its goal the creation of a separate "new instrument" for the protection of performers and producers — reflecting the civil law tradition of protecting performers and producers of sound recordings under the separate rubric of neighboring rights (or related rights, as they are sometimes called), rather than copyright.

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[8] Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971).

In 1993, at the urging of the United States, the Committees of Experts on the Berne Protocol and the New Instrument began considering the possible need for new international norms to address the effects on copyright owners of digital technologies and the rapid growth of digital networks.[9] The emergence and widespread use of these technologies exposed copyright owners to substantial risks of massive global piracy, while at the same time holding out the promise of new markets, new distribution channels and new means of licensing copyrighted works. In addition, digital technology created greater possibilities to use technological means to foil would-be infringers.

A central component of the "digital agenda" in the Berne Protocol and New Instrument discussions was to include in any new treaty a measure against the circumvention of technological measures employed by right holders to protect their rights. By 1993 it was widely recognized that, while use of technological measures to protect works was likely to become a critical element in a digital network environment, those measures were vulnerable to tampering. Widespread availability and use of devices or software for circumventing technological measures would imperil the right holder's reproduction right and, ultimately, could serve to dissuade right holders from making their works available in digital form.

Proposals up to and including the documents prepared for the 1996 Diplomatic Conference focused on prohibiting the making and selling of devices, or provision of services, for the purpose of circumvention. The obligation adopted by the Diplomatic Conference and set forth in Article 11 of the WCT and Article 18 of the WPPT is somewhat less precise. Rather than specifying the particular means of achieving the desired result — the prevention of circumvention of technological protection measures — the treaties require Contracting Parties to put in place adequate and effective legal measures for achieving that result.[10] Contracting Parties are afforded a degree of flexibility in determining precisely how to implement this obligation within their respective legal systems, provided that the implementation is adequate and effective against circumvention.

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[9] *E.g.*, WIPO, Questions Concerning a Possible Protocol to the Berne Convention — Part III, New Items, WIPO Doc. No. BCP/CE/III/2-III at ¶¶74-75 (March 12, 1993).

2. Implementation of the WIPO Treaties in the DMCA

The Administration proposed and Congress adopted a minimalist approach in implementing the WCT and the WPPT in U.S. law.[11] In this context, "minimalist" was understood to mean that any provision of the treaty that was already implemented in U.S. law would not be addressed in new legislation. As to treaty obligations that were not adequately addressed in existing U.S. law, new measures would have to be adopted in implementing legislation in order to satisfy these obligations.

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[10] Article 11 of the WCT states:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 18 of the WPPT states:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

[11] The U.S. took the same approach in implementing the Berne Convention in 1988. *See* H.R. Rep. No. 100-609, at 20 (1988).

Protection against circumvention was determined not to be adequately covered by U.S. law. Certain specific instances of circumvention were prohibited by federal law, such as unauthorized decryption of encrypted satellite signals and trafficking in the means to do so,[12] but coverage was not comprehensive. To the extent that circumvention requires reproduction of the work that is protected by a technological measure, an act of circumvention can constitute copyright infringement. In addition, some instances of providing devices that circumvent technological measures could constitute contributory copyright infringement, but those circumstances would be extremely narrow — confined essentially to those instances where the device used to circumvent has *no* substantial noninfringing uses.[13] Consequently, new legislation was deemed necessary to implement the anticircumvention obligation in Article 11 of the WCT and Article 18 of the WPPT.[14]

a. *Section 1201 - Anticircumvention*

A principal means of addressing the risk of infringement in the digital age was to encourage copyright owners to help themselves by using technological measures to protect works in digital form. Section 1201 of the DMCA reinforces those technological measures through legal sanctions against those who circumvent them. Not only does section 1201 prohibit the manufacture and distribution of devices, and the rendering of services, for the purpose of circumventing technological measures that protect against unauthorized access to works, or unauthorized exercise of the rights of the copyright owner, it also addresses the conduct of circumventing a technological measure that protects access.

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[12] 47 U.S.C. § 605.

[13] *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (manufacture of a staple article of commerce such as a copying device is not contributory infringement if it is "merely . . . capable of substantial noninfringing uses").

[14] H.R. 2281, 105th Cong., 1st Sess. (1997); S. 1146, 105th Cong., 1st Sess. (1997).

It was determined early in the legislative drafting process that a prohibition on the *devices and services* that enable circumvention (the original focus of the treaty proposals) would be a critical element in treaty implementation, notwithstanding the fact that the treaty obligation was formulated broadly enough to include, potentially, national laws directed at the *act* of circumventing technological protection measures. Since the act of circumvention frequently entails copyright infringement, or is immediately followed by an act of infringement, a legal prohibition focusing exclusively on the act of circumvention would add little to existing protections under copyright, and would suffer from the same practical difficulties in enforcement.[15] Whether under copyright or under a specific prohibition on circumvention, a copyright owner's only recourse would be to detect individual violations by users of copyrighted works and bring a multitude of actions against the violators unfortunate enough to get caught. From a practical standpoint this outcome was viewed as an expensive, inefficient, and ultimately ineffective means of combating on-line infringement. By contrast, a prohibition on the manufacture, import or sale of devices, or rendering of services, for the circumvention of technological measures can prevent infringement by keeping the tools that enable circumvention out of the hands of individual users.

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[15] *Cf.* S. Rep. No. 105-190, at 12 (1998) ("The copyright law has long forbidden copyright infringements, so no new prohibition [on circumvention of copy control technologies] was necessary.").

In addition to ensuring that protection against circumvention would be adequate and effective as required by the treaties, the drafters of the implementing legislation sought to protect the countervailing interest of users in their continuing ability to engage in noninfringing uses of copyrighted works. The principal means of accomplishing this goal was to divide technological protection measures into two categories — measures that control access to a work and measures that control the exercise of exclusive rights with respect to a work— and to treat these categories differently.

Fair use and other exceptions and limitations to a copyright owner's exclusive rights are defenses to copyright infringement — that is, the unauthorized exercise of the copyright owner's exclusive rights. Technological measures that control or prevent the exercise of those exclusive rights (often referred to by the shorthand phrase "copy control measures") thus have a direct relationship to fair use and other copyright exceptions. Activity that may be permitted under these exceptions could, nonetheless, result in liability under a prohibition on circumvention that included copy control measures. For this reason, the implementing legislation proposed by the Administration did not (and the DMCA does not) prohibit the conduct of circumventing of copy control measures.

By contrast, fair use and other copyright exceptions are not defenses to gaining unauthorized access to a copyrighted work: Quoting a manuscript may be a fair use; breaking into a desk drawer and stealing it is not.[16] Circumventing access control measures was, therefore, prohibited in the Administration's proposed implementing legislation.

As to both types of technological measures, trafficking in circumvention tools — devices and services that enable circumvention — was prohibited under the Administration proposal if those tools meet at least one of three statutory criteria relating to the purpose for which the tool is designed, the predominant commercially significant use of the tool and the purpose for which the tool is marketed. This basic structure was retained throughout the legislative process and has been enacted into law as part of the DMCA.[17]

b. *Section 1202 - Copyright Management Information*

In addition to the anticircumvention provisions of title I, Congress also found that U.S. law did not adequately meet the requirements of the WIPO treaties that require contracting states to prohibit the removal or alteration of copyright management information (CMI).[18] As a

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[16] *See* H.R. Rep. No. 105-551, pt. 1, at 17 (1998) ("The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.") (House Judiciary Committee).

[17] 17 U.S.C. § 1201

[18] Article 12 of the WCT provides in relevant part:

> Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
>
> (i) to remove or alter any electronic rights management information without

consequence, Congress enacted a new section as part of title I of the DMCA implementing the obligation to protect the integrity of CMI.[19] The scope of protection for this section is set out in two separate paragraphs, the first addressing false CMI[20] and the second prohibiting the removal or alteration of CMI. Subsection (a) prohibits the knowing provision or distribution of false CMI, if done with the intent to induce, enable, facilitate or conceal infringement. Subsection (b) bars the intentional removal or alteration of CMI without the authority of the copyright owner, as well as the dissemination of CMI or copies of works, knowing that the CMI has been removed or altered without authority. These provisions of the DMCA differ from other copyright provisions in title 17 in that they require that the act be done with knowledge or, with respect to civil remedies, with reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement.

The implementation of these provisions to protect the integrity of CMI in U.S. law go beyond the minimum requirements in the two WIPO treaties.[21] The law does not, however,

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> authority;
>
> (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Article 19 of the WPPT contains nearly identical language.

[19] 17 U.S.C. § 1202.

[20] Provision of false CMI is not prohibited under the WIPO treaties. A prohibition on false CMI was, however, proposed in an Administration white paper in 1995, and introduced in Congress that same year. Information Infrastructure task force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 235-36 (1995); H.R. 2441, 104th Cong., 1st Sess. § 4 (1995); S. 1284, 104th Cong., 1st Sess. § 4 (1995). It appears these proposals carried over into the Administration proposal for treaty implementation and, ultimately, into the DMCA as enacted.

[21] *See supra* note 20.

address the liability of persons who manufacture devices or provide services and it does not mandate the use of CMI or any particular type of CMI. It "merely protects the integrity of CMI if a party chooses to use it in connection with a copyrighted work."[22]

c. *Origin of the Present Report*

During the legislative process leading to the enactment of the DMCA, there were concerns raised about the adverse effects of these new protections on traditional noninfringing uses of copyrighted works that were privileged under limitations of the exclusive rights in the Copyright Act. In particular, concerns about the future viability of, *inter alia*, fair use and the first sale doctrine, and about liability for temporary incidental copies, were raised by segments of the public and Members of Congress.

One remedial method of addressing these concerns was the incorporation of a triennial rulemaking proceeding to be conducted by the Copyright Office.[23] This rulemaking process was created to examine whether section 1201(a)(1) has had or is likely to have any adverse effect on noninfringing uses of copyrighted works. It was intended to operate as a recurring means of monitoring the effect of section 1201(a)(1) on the market. Congress provided the Librarian of Congress with the regulatory authority to exempt "particular classes of works" for which users of copyrighted works were adversely affected in their ability to make noninfringing uses. On

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[22] House Manager's Statement, *supra* note 7 at 20.

[23] *Id.* § 1201(a)(1)(C).

October 27, 2000, the results of the first rulemaking proceeding were published in the Federal Register.[24]

Another response to the concerns about the continued applicability of the first sale doctrine in section 109 of the Copyright Act and the temporary reproductions that are incidental to lawful uses of works on digital equipment was a bill proposed by Representative Rick Boucher and Representative Tom Campbell (the "Boucher-Campbell bill").[25] One of the changes suggested in this bill was a modification of section 109 to make the first sale privilege apply expressly to digital transmissions of copyrighted works.[26] Another section of the bill proposed amending section 117 of the Copyright Act to allow reproductions of digital works that were incidental to the operation of a device and that did not affect the normal exploitation of the work.[27] At that time, based on the evidence available to it, Congress did not adopt this proposal.

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[24] 65 Fed. Reg. 64,556 (October 27, 2000). Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. Final rule.

[25] H.R. 3048, 105th Cong., 1st Sess. (1997).

[26]

SEC. 4. FIRST SALE.

Section 109 of title 17, United States Code, is amended by adding the following new subsection at the end thereof:

`(f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

[27]

SEC. 6. LIMITATIONS ON EXCLUSIVE RIGHTS.

(a) TITLE- The title of section 117 of title 17, United States Code, is amended to read as follows:

Instead Congress chose to have the Copyright Office and NTIA jointly conduct a study. In setting the parameters of this Report, however, the legislative history demonstrates that the scope of the Report was not intended to comprehend the full sweep of the proposals made in the Boucher-Campbell bill.[28]

`Sec. Limitations on exclusive rights: Computer programs and digital copies';

(b) DIGITAL COPIES–Section 117 of title 17, United States Code, is amended by inserting `(a)' before`Notwithstanding' and inserting the following as a new subsection (b):

`(b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying--

`(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and

`(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

[28] The Boucher-Campbell bill also included proposals on the following:

- expanding fair use to include uses by analog or digital transmission in connection with teaching, research, and other specified activities. The proposal was not acted on;
- expanding the rights of libraries and archives to reproduce and distribute copies or phonorecords to authorize three copies or phonorecords to be reproduced or distributed for preservation, security, or replacement purposes, and to permit such copies to be in digital form. This proposal, with some modifications, was enacted as section 404 of the DMCA;
- revising limitations on exclusive rights to provide for certain distance education activities. The DMCA directed the Register of Copyrights to study the issue of promoting distance education through digital technologies and provide recommendations to Congress. Copyright Office, "Report on Copyright and Digital Distance Education" (1999). Based in large part on recommendations made in the Copyright Office's Study, this proposal has now been taken up in S. 487, which passed the Senate and is currently pending in the House;
- preemption of terms in non-negotiated licenses that abrogate or restrict the limitations on exclusive rights in chapter 1 of the Copyright Act. This proposal was not acted on. See discussions *infra* at 69-71 and 162-164;
- copyright protection and management systems. These provisions were proposed as an alternative to the anticircumvention and CMI provisions of the DMCA. The DMCA version prevailed and was enacted.

In an amendment to H.R. 2281 offered by Representative Rick White and adopted by the House Commerce Committee, what was to become the joint study by the Copyright Office and NTIA was introduced into the DMCA. Section 205 of the House Commerce Committee proposal called for a broad evaluation of the copyright law and electronic commerce "to ensure that neither the copyright law nor electronic commerce inhibits the development of the other."[29]

By the time the bill reached the House floor on August 4, 1998, the language regarding the joint study by the Copyright Office and NTIA had been pared back to focus on an evaluation of "the impact of this title and the development of electronic commerce on the operation of sections 109 and 117 of title 17, and the relationship between existing and emerging technology on the operation of those provisions."[30] This change makes it clear that Congress was not seeking a broad review of copyright and electronic commerce issues, but focused instead on two particular sections of the Copyright Act.

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[29] *Id.* § 6 H.R. Rep.No. 105-551, pt. 2, at (1998) at 18.

SEC. 205. EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT.

(a) FINDINGS–In order to maintain strong protection for intellectual property and promote the development of electronic commerce and the technologies to support that commerce, the Congress must have accurate and current information on the effects of intellectual property protection on electronic commerce and technology. The emergence of digital technology and the proliferation of copyrighted works in digital media, along with the amendments to copyright law contained in this Act, make it appropriate for the Congress to review these issues to ensure that neither copyright law nor electronic commerce inhibits the development of the other.

(b) EVALUATION BY SECRETARY OF COMMERCE–The Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information and the Register of Copyrights, shall evaluate–

(1) the effects of this Act and the amendments made by this Act on the development of electronic commerce and associated technology; and

(2) the relationship between existing and emergent technology and existing copyright law.

(c) REPORT TO CONGRESS-The Secretary of Commerce shall, not later than 1 year after the date of the enactment of this Act, submit to the Congress a report on the evaluation conducted under subsection (b), including any legislative recommendations the Secretary may have.

In explaining the reasons for examining section 109, the House Manager's Statement stated that:

> [t]he first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or otherwise dispose of the possession of that copy. Rather, "disposition" of a digital copy by its owner normally entails reproduction and transmission of that reproduction to another person. The original copy may then be retained or destroyed. The appropriate application of this doctrine to the digital environment merits further evaluation and this section therefore calls for such an evaluation and report."[31]

The reference to section 109 in the bill plainly refers back to the digital first sale proposal in the Boucher-Campbell bill. Although there is no similar legislative history explaining why section 117 is included in the Report, the most likely explanation is that it is an oblique reference to the proposed exception for incidental copies in section 6 of the Boucher-Campbell bill – particularly given the absence of any contemporaneous discussions concerning the scope of the computer program exemptions in section 117 (apart from title III of the DMCA). The Boucher-Campbell proposal on incidental copies would have been codified in section 117 of the Copyright Act.

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[30] House Manager's Statement, *supra* note 7, at 24. The conference committee made no substantive changes to the language of this section, which was ultimately enacted as section 104 of the DMCA.

[31] *Id.*

As ultimately enacted, section 104 of the DMCA requires the Copyright Office and NTIA jointly to evaluate:

> (1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and
>
> (2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

B. SECTION 109 AND THE FIRST SALE DOCTRINE

Section 109 of the Copyright Act restates the principle commonly referred to as the "first sale doctrine." Under the first sale doctrine a copyright owner does not retain the legal right to control the resale or other distribution of copies or phonorecords of a work that have already been lawfully sold. The first sentence of section 109(a) of the Copyright Act provides:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

It is this provision of the copyright law that permits sales of used books and CDs, lending of books and other copyrighted materials by libraries, and rentals of videocassettes, among other activities, without the need to obtain the permission of copyright owners or make royalty payments.

1. History of the First Sale Doctrine

The first sale doctrine was initially a judicial doctrine. In *Bobbs-Merrill Co. v. Straus,*[32] the U.S. Supreme Court held that a copyright owner's exclusive right to "vend" did not permit it to impose a price limitation on the retail sale of books in the absence of any agreement as to the future sale price. In its interpretation of the reach of the vending right, the Court expressed doubt that Congress intended to abrogate the common-law principle that restraints on the alienation of tangible property are to be avoided. It posed and answered a series of rhetorical questions:

> What does the statute mean in granting 'the sole right of vending the same'? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.[33]

The Court drew a sharp distinction between the reproduction right and the right to vend. It noted, as a matter of statutory construction, that the reproduction right was the "main purpose" of the copyright law, and the right to vend existed to give effect to the reproduction right.[34] Since a grant of control to the copyright owner over resales would not further this main purpose of protecting the reproduction right, the Court was unwilling to read the statute as providing such a grant:[35]

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[32] 210 U.S. 339 (1908).

[33] *Id.* at 349-50.

[34] *Id.* at 350-51.

> In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose . . . a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work . . . . True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book . . . . To add to the right of exclusive sale the authority to control all future retail sales . . . would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.[36]

The parties in *Bobbs-Merrill* also raised, and the Court of Appeals addressed, antitrust concerns. Although the Supreme Court did not address these concerns, it was undoubtedly aware of them,[37] and competition policy is viewed as one of the underlying bases for the first sale doctrine.[38]

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[35] *Id.*

[36] *Id.*

[37] "This conclusion renders it unnecessary to discuss other questions noticed in the opinion in the Circuit Court of Appeals, or to examine into the validity of the publisher's agreements, alleged to be in violation of the acts to restrain combinations creating a monopoly or directly tending to the restraint of trade." *Id.*

[38] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8.12[A] [hereinafter NIMMER].

2. Legislative History of Section 109

The year following the *Bobbs-Merrill* decision, Congress codified the first sale doctrine in the Copyright Act of 1909.[39] Section 109(a) of the Copyright Act of 1976 carried forward the existing federal policy of terminating a copyright owner's distribution right as to a particular lawfully-made copy or phonorecord of a work after the first sale of that copy. The House Report explains:

> Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.[40]

Section 109 creates a two-prong test for eligibility for the privileges[41] under section 109. First, the person must be the owner of the copy[42] at issue. This applies to ownership of the tangible item (e.g., a book, photograph, videocassette, CD, floppy disc, etc.) in which a copyrighted work is fixed.[43] While ownership may be obtained by virtue of a sale, this prong is also satisfied if ownership is obtained by virtue of gift, bequest, or other transfer of title.[44] It does not apply to mere possession, regardless of whether that possession is legitimate, such as by rental, or illegitimate, such as by theft.[45] Nor does it refer to ownership of the copyright or of any of the exclusive rights.[46]

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[39] Section 27 of the 1909 Copyright Act provided:

> The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; *but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained*.

17 U.S.C. § 27 (1977) (emphasis added).

[40] H.R. Rep. No. 94-1476, at 79 (1976) ["1976 House Report"].

[41] Many of the commenters referred to the first sale doctrine as a "right." This is an inartful term to describe the doctrine. Rights are guaranteed to individuals and are generally enforceable in court. The first sale doctrine is not an enforceable right from the standpoint of the owner of a copy – that is, there is no independent remedy if a person is effectively denied the benefits of section 109 through technological or contractual means. The first sale doctrine is a limitation to the scope of copyright; specifically it is a limitation to the distribution right of copyright owners.

[42] For convenience, the term "copy" will be used with the understanding that it incorporates phonorecords as well.

Second, that copy must have been lawfully made. Ownership of a copy that is not authorized by either the copyright owner or the law, even if the owner is unaware of the piratical nature of the copy, does not permit the owner to avail himself of section 109.[47] Nothing in the statute limits the manner in which the making of the copy may be accomplished, so long as the resulting copy is lawful.

The statute does not distinguish between analog and digital copies. Consequently, it does not matter whether the work is embodied in an analog videocassette or a digital DVD – the copyright owner's distribution right with respect to that particular copy is extinguished once ownership of the copy has been transferred, and the new owner is entitled to dispose of that copy as he desires.

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[43] Nimmer, *supra* note 38, at § 8.12[B][1].

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Nimmer, *supra* note 38, at § 8.12[B][4].

3. Subsequent Amendments to Section 109

Congress has seen fit on three occasions to limit the effect of the first sale doctrine. In the Record Rental Amendment of 1984,[48] Congress amended section 109 to allow copyright owners of sound recordings and the musical works embodied therein to retain the exclusive right to dispose of a particular phonorecord by rental, lease or lending for purposes of direct or indirect commercial advantage, even after a lawful first sale of that phonorecord. The purpose of the amendment was to prevent the displacement of record sales by "rentals" that were, in fact, thinly-disguised opportunities for consumers to make personal copies of records without buying them.[49] In essence the so-called "rental right" serves to guard against infringement of the reproduction right. Congress extended the same concept to computer programs in the Computer Software Rental Amendments Act of 1990.[50] Both provisions have been incorporated into multilateral agreements and are now widely-accepted international standards.[51]

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[48] Pub. L. No. 98-450, 98 Stat. 1727 (1984).

[49] H.R. Rep. No. 98-987, at 2. (1983).

[50] Title VII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134 (1990). Both the Record Rental Amendment and the Computer Software Rental Amendments Act are codified at 17 U.S.C. § 109(b).

[51] Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), Articles 11 and 14.4 (1994); WIPO Copyright Treaty, Article 7 (1996); WIPO Performances and Phonograms Treaty, Articles 9 and 13 (1996).

Congress also limited the effect of the first sale doctrine when, in the course of implementing U.S. obligations under the TRIPS agreement in 1994, it extended copyright protection to certain preexisting works of foreign origin that had previously fallen into the public domain in the United States. Under section 109(a), as amended by the Uruguay Round Agreements Act,[52] copies embodying certain restored copyrights may not be sold or otherwise disposed of without the authorization of the copyright owner more than twelve months after the person in possession of the copies receives actual or constructive notice that the copyright owner intends to enforce his rights in the restored work.

By the same token, Congress has, on one occasion, expanded the first sale doctrine to cover not only the distribution right, but the public performance and public display rights as well.[53] Although legislatively sunsetted on October 1, 1995, section 109(e) permitted the public performance or display of an electronic videogame intended for use in coin-operated equipment.[54]

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[52] Pub. L. No. 103-465, 108 Stat. 4809, 4981 (1994).

[53] Section 109(c) also permits public display in limited circumstances: "Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located." This provision permits, among other things, the display of a painting in a museum or public art gallery by the purchaser of the painting.

[54] Pub. L. No. 101-650, § 804(c), 104 Stat. 5089, 5136 (1990) was enacted as part of the Computer Software Rental Amendments of 1990 in order to overturn the result in *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990), a case which held that a copyright owner could prevent the purchaser of gray market circuit boards containing a copyrighted videogame from performing the videogame in a video arcade.

C. SECTION 117 COMPUTER PROGRAM EXEMPTIONS

Section 117 of the Copyright Act limits the exclusive rights of copyright owners by allowing the lawful owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that program only for archival purposes or if it is necessary as an essential step in the utilization of the program in conjunction with a machine. [55]

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[55] In its entirety, section 117 reads as follows:

§ 117. Limitations on exclusive rights: Computer programs

(a) Making of Additional Copy or Adaptation by Owner of Copy.-Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, Sale, or Other Transfer of Additional Copy or Adaptation.-Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) Machine Maintenance or Repair.-Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if-

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) Definitions.-For purposes of this section-

(1) the "maintenance" of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

In addition, pursuant to an amendment contained in title III of the DMCA,[56] section 117 permits the owner or lessee of a machine to make or authorize the making of a temporary copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes of maintenance or repair of that machine. The exemption only permits a copy that is made automatically when a computer is activated, and only if the computer already lawfully contains an authorized copy of the program. The new copy cannot be used in any other manner and must be destroyed immediately after the maintenance or repair is completed.

1. Legislative History of Section 117

a. *Recommendations of CONTU*

The transformation of section 117 into its current form dealing with computer programs began in the 1970s. When the 1976 Act took effect on January 1, 1978, Congress' approach to problems relating to computer uses of copyright works was still "not sufficiently developed for a definitive legislative solution."[57] Congress enacted what was commonly referred to as a "moratorium" provision in section 117, which preserved the status quo on December 31, 1977 (i.e., the day before the 1976 Copyright Act became effective) as to use of copyrighted works in conjunction with computers and similar information systems.[58]

> (2) the "repair" of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

[56] Computer Maintenance Competition Assurance Act, Pub. L. No. 105-304, 112 Stat. 2860, 2886 (1998), codified at 17 U.S.C. § 117.

[57] 1976 House Report, *supra* note 40, at 116.

[58] *Id.* at 19. Former section 117 provided:

Notwithstanding the provisions of sections 106 through 116 and 118, this title does not afford to

Congress stated at that time that it would look to the National Commission on New Technological Uses of Copyrighted Works (CONTU) to "recommend definitive copyright provisions to deal with the situation."[59] CONTU was created in 1974[60] to assist the President and Congress in developing a national policy for both protecting the rights of copyright owners and ensuring public access to copyrighted works when they are used in computer and machine duplication systems, bearing in mind the public and consumer interest.

Between CONTU's inception in 1974 and the issuance of its final report on July 31, 1978, the 1976 Copyright Act was enacted and became effective.[61] The final report recommended that section 117 as enacted in 1976 be repealed in its entirety to ensure that the generally applicable copyright rules set forth in the 1976 Copyright Act apply to all computer uses of copyrighted works.[62] In addition, CONTU proposed that the Act be amended: (1) to define "computer program";[63] (2) to ensure that rightful possessors of copies of computer programs may use or adapt these copies for their use, because "placement of a work into a

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> the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in action brought under this title.

[59] 1976 House Report, *supra* note 40, at 116.

[60] Pub. L. No. 93-573, 88 Stat. 1873 (1974).

[61] Final Report of the National Commission on New Technological Uses of Copyrighted Works 3-4 (1979) [hereinafter CONTU Report]. Although the report was issued in 1978, it was published in 1979.

[62] *Id.* at 12-13.

[63] Congress had already made it clear in legislative history that computer programs, to the extent that they embody a programmer's original expression, were protected under copyright within the category of "literary works." 1976 House Report, *supra* note 40, at 54.

computer is the preparation of a copy;"[64] and (3) to permit rightful possessors of computer programs to make archival (backup) copies of programs to "guard against destruction or damage by mechanical or electrical failure."[65]

b. *The 1980 Computer Software Copyright Amendments*

Congress adopted CONTU's recommendations in the Computer Software Copyright Amendments of 1980 with few changes.[66] The House Report accompanying the 1980 amendments did not explain the intent of the legislation, other than to "implement the recommendations of the [CONTU] Commission with respect to clarifying the law of copyright of computer software."[67] In the absence of a substantive discussion in the committee report, some courts have treated the CONTU Report as the legislative history of the 1980 amendments to the Copyright Act.[68] Other courts have expressed scepticism regarding the use of a report by an independent commission as evidence of congressional intent.[69]

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[64] CONTU Report, *supra* note 61, at 13.

[65] *Id.*

[66] Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980). Congress changed "rightful possessor" to "owner."

[67] H.R. Rep No. 96-1307, pt. I (1980).

[68] *See, e.g., Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 525 (9th Cir. 1984) (employing CONTU Report as legislative history of the 1980 amendments); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247-48, 1252 (3d Cir. 1983)(same).

[69] *See, e.g., Lotus Dev. Corp. v. Borland Int'l., Inc.*, 788 F. Supp. 78, 93 (D. Mass. 1992), *rev'd on other grounds*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 116 S. Ct. 804 (1996).

As enacted in 1980, section 117 permits the owner of a copy of a computer program to make an additional copy of the program for archival purposes[70], or where the making of such a copy is "an essential step in the utilization of the computer program in conjunction with a machine and . . . is used in no other manner . . . ."[71]

c. *The Computer Maintenance Competition Assurance Act of 1998*

Section 117 was further amended by title III of the DMCA, the Computer Maintenance Competition Assurance Act of 1998. The amendment was intended to "provide a minor, yet important, clarification in section 117 of the Copyright Act to ensure that the lawful owner or lessee of a computer machine may authorize an independent service provider, a person unaffiliated with either the owner or lessee of the machine, to activate the machine for the sole purpose of servicing its hardware components."[72] Title III was prompted by the outcome in *MAI Systems Corp. v. Peak Computer, Inc.*[73] and other cases that had held an independent service organization liable for copyright infringement by virtue of loading operating system software into a computer's RAM when a technician switched the computer on in order to repair or maintain it. Rather than addressing the general question of temporary copies as proposed in some contemporaneous bills,[74] title III of the DMCA narrowly overturned the outcome of *MAI v. Peak* with respect to independent service organizations, leaving the underlying holding with respect to temporary copies intact.

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[70] "Archival purposes," in this context, was intended to mean the backing up of copies by users, not for the purposes of, for example, expanding a library's archival collection.

[71] 17 U.S.C. § 117(a)(1).

[72] 144 Cong. Rec. S11890 (daily ed. Oct. 8, 1998) (statement by Sen. Leahy).

[73] 991 F.2d 511, *cert. dismissed*, 114 S. Ct. 671 (1994).

[74] *See* discussion of the Boucher-Campbell bill, *supra* at 15.

2. Judicial Interpretation of Section 117

Courts have interpreted the section 117 exceptions narrowly. For example, in *Sega Enterprises Ltd. v. Accolade, Inc.*,[75] the Ninth Circuit held that copying a computer program into memory in order to disassemble it was a use that "went far beyond that contemplated by CONTU and authorized by section 117."[76] Regarding the archival exemption, one court has held that section 117 does not excuse the making of purported backup copies of a videogame embodied in ROM, because that particular storage medium is not vulnerable to "damage by mechanical or electrical failure."[77]

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[75] 977 F.2d 1510 (9th Cir. 1992).

[76] *Id*. at 1520.

[77] *Atari, Inc. v. J S & A Group, Inc.*, 597 F. Supp. 5, 9-10 (N.D. Ill. 1983).

II. VIEWS OF THE PUBLIC

A. SOLICITATION OF PUBLIC COMMENTS

In order to focus the issues involved in this Report, and to provide information and assistance to the Copyright Office and NTIA, the two agencies sought both written comments and oral testimony from the public. This process of public consultation commenced with the publication of a Notice of Inquiry in the Federal Register on June 5, 2000.[78]

The Notice of Inquiry sought comments and reply comments in connection with the effects of the amendments made by title I of the DMCA and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections.[79]

In response to the Notice of Inquiry, we received thirty initial comments and sixteen reply comments.[80] Of those thirty initial comments, twenty-one dealt with section 109 and twelve dealt with section 117. Of the sixteen replies (to the initial comments), thirteen dealt with section 109 and eight dealt with section 117.

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[78] 65 Fed Reg 35,673 (June 5, 2000).

[79] *Id.* For a more complete statement of the background and purpose of the inquiry, see the Notice of Inquiry which is available on the Copyright Office's website at: www.loc.gov/copyright/fedreg/65fr35673.html.

[80] The comments and replies have been posted on the Office's website; *see* www.loc.gov/copyright/reports/studies/dmca/comments/ and www.loc.gov/copyright/reports/studies/dmca/reply/, respectively.

On October 24, 2000, the two agencies published a notice of public hearing in the Federal Register.[81] At this public hearing, held at the Copyright Office on November 29, 2000, the two agencies inquired into points made in the written comments and focused on a series of specific questions. The information received from the written comments, as well as from the testimony of witnesses at the November 2000 public hearing, is summarized here.[82]

B. VIEWS CONCERNING SECTION 109[83]

1. The Effect of Section 1201 Prohibitions on the Operation of the First Sale Doctrine

There was a dramatic range of opinions in the many comments addressing this question. Most commenters believed that the anticircumvention provisions of 17 U.S.C. § 1201 provided copyright owners with the ability to restrict the operation of the first sale doctrine. A few of these commenters did not elaborate on this assertion. Those who did expressed many different views on precisely how the rule against the circumvention of technological protection measures restricts the operation of the first sale doctrine, and how severe that effect is.

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[81] 65 Fed Reg 63,626 (October 24, 2000).

[82] Summaries of testimony are available on the Copyright Office website at www.loc.gov/copyright/reports/studies/dmca/testimony/hearings.html; a full transcript of the public hearing is available at www.loc.gov/copyright/reports/studies/dmca/testimony/transcript.pdf.

[83] In referring to the comments and hearing materials, we will use the following abbreviations: C-Comment, R-Reply Comment, WST-Written Summary of Testimony, T + speaker-Hearing Transcript. Citations to page numbers in the hearing transcript are to the PDF version of the transcript on the Copyright Office website: www.loc.gov/copyright/reports/studies/dmca/testimony/transcript.pdf.

Among those who believed that section 1201 limits first sale, the majority of comments focused on one of two practical concerns surrounding the market for DVDs. The first addressed the proprietary encryption scheme known as the Content Scrambling System[84] (CSS) that is used on commercial DVDs, and the requirement that manufacturers be licensed to produce DVD players. The second addressed the practice known as region coding.[85]

Most commercially released motion pictures on DVD, as noted by many commenters, are encrypted using CSS. Some commenters noted further that the only devices that are authorized to decrypt DVDs are DVD players that have been manufactured under a license from the consortium (which includes the major motion picture studios) that owns the rights to CSS.[86] As a result, the commenters complained, they are required to make two purchases in order to view a single DVD (i.e., the DVD and the player).[87] Certain commenters suggested that the practice of requiring a licensed player in order to view a DVD amounts to a violation of antitrust law.[88]

But for the anticircumvention law, it would be permissible for a person to use an unauthorized decryption program to view DVDs on devices other than authorized players, such as personal computers, if necessary. Such a program was found in violation of section 1201 in a highly publicized court case.[89] Some commenters discussed the case in great detail in their comments.[90]

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[84] CSS is the technological protection measure adopted by the motion picture industry and consumer electronics manufacturers to provide security to copyrighted content of DVDs and to prevent unauthorized copying of that content. Motion Picture Association of America website: www.mpaa.org/Press, visited on May 1, 2001.

[85] *See* discussion *infra*, at 36.

[86] C-Arromdee, at 1.

[87] C-Taylor, at 1.

[88] C-National Association of Recording Merchandisers, Inc. (NARM) and the Video Software Dealers Association, Inc. (VSDA), at 29-30.

The implication of the complaint about the CSS encryption code is that by enabling copyright owners to compel users to purchase a licensed DVD player, the value of a DVD is reduced. It is, argued some commenters, a requirement that each subsequent owner of a DVD obtain a new authorization to view the contents of that work.[91] That, in turn, means that the value of the first sale doctrine as applied to DVDs is reduced or eliminated. Thus, as applied to the market for DVDs, these commenters argued that the operation of the first sale doctrine has been obstructed by the rules against circumvention of technological protection measures.[92]

The concerns about region coding of DVDs are similar in nature. Region coding is a technological means of preventing DVDs manufactured for sale in one region of the world from playing on a DVD player that is manufactured for sale in a different region of the world. The result is that a DVD purchased in Asia cannot be viewed on a licensed DVD player purchased in the United States.[93] Were unauthorized circumvention permissible, region coding could be defeated. These commenters argued that region coding reduces the value of the first sale doctrine by limiting the market for resale of a DVD. And because the anticircumvention rules prevent users from defeating region coding, these commenters argued that those rules are interfering with the operation of the first sale doctrine.[94]

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[89] *See Universal City Studios, et al. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000). The case is presently on appeal to the Second Circuit. *Universal City Studios, et al. v. Corley*, docket #00-9185.

[90] C-Thau and Taylor, at 4 *et seq*.

[91] *E.g.*, C-Taylor, at 1.

[92] *E.g.*, C-Arromdee, at 1.

[93] Some DVD players can be switched from one region setting to another, but the user may only switch a few times before being permanently locked into a region.

Others who believe that prohibitions on circumvention of technological protection measures have restricted the operation of the first sale doctrine were more general in their comments. One representative sample is a comment which noted that access controls that permit access on only a single device are likely to interfere with the exercise of the first sale doctrine.[95] This comment also addressed other situations, noting that access controls sometimes limit the amount of a work that is viewable at any time. While acknowledging that this serves a reasonable anti-piracy purpose, the comment also noted that such a practice makes it less likely that the user will exercise the first sale privilege. This is because in order to obtain a complete tangible copy of the work the user will have to separately print out numerous small portions.[96] This comment also observed that while files that require a password to gain access may not be limited to one device, transfer of the password, or "key," may be restricted in a way that prevents transfer of a file in a usable form.[97]

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[94] *E.g.*, C-LXNY, at 1.

[95] C-Computer Professionals for Social Responsibility (CPSR), at 2.

[96] *Id.* at 3, 5.

[97] *Id.* at 4.

That final point was echoed by a number of commenters. Their concern was that the non-negotiable licenses which are offered to users of copyrighted works are written to reduce or eliminate the availability of statutorily permitted uses, including uses permitted under section 109.[98] These terms may be enforced through technological protection measures. Thus, they argued, the rules against circumvention of such measures hamper the operation of the first sale doctrine.[99] This concern was particularly evident among users of computer software, who decried so-called shrinkwrap and click-wrap licenses.[100] A few commenters delved into a discussion of the relative merits of the Uniform Computer Information Transactions Act[101] (UCITA) – legislation that is currently being considered in numerous state legislatures, that would validate the enforceability of shrinkwrap and click-wrap licenses.[102]

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[98] *E.g.*, C-American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association (Library Ass'ns), at 5-7.

[99] *Id.*

[100] Shrinkwrap and click-wrap licenses are terms used to describe the non-negotiable licensing terms that are sometimes placed on consumer packaging of copyrighted works, particularly software, in lieu of a simple sale of that copy of the work. The names derive from the practice of demonstrating users' assent to the terms by virtue of their tearing open the plastic shrinkwrap packaging or clicking an "agree" button with a mouse.

[101] The Uniform Computer Information Transactions Act (UCITA), according to the National Conference of Commissioners on Uniform State Laws, represents the first comprehensive uniform computer information licensing law. This act uses the accepted and familiar principles of contract law, setting the rules for creating electronic contracts and the use of electronic signatures for contract adoption – thereby making computer information transactions as well-grounded in the law as traditional transactions. National Conference of Commissioners on Uniform State Laws website: www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucita.htm , visited on May 2, 2001.

[102] *E.g.*, C-Lyons, at 3-5; R-Software and Information Industry Association (SIIA), at 10-11.

Similar concerns were also raised in the submission of the library associations.[103] They expressed concern that rules against circumvention give copyright owners the ability to maintain a running control on access to and copying of their works.[104] This, they argued, frustrates the goal of the first sale doctrine, by extending the rights of the copyright owner beyond the first sale of a particular copy.[105] As tangible examples of how this interference in the operation of the first sale doctrine might inhibit the functioning of a library, they gave several examples including interlibrary loan programs, preservation, and accepting donations of works.[106] All of these, they argued, have become difficult or impossible as a result of the intersection of licensing terms, technological measures and restrictions on circumvention.[107]

Other commenters had varying explanations for their belief that anticircumvention rules have hampered the first sale doctrine. For example, one commenter argued that anticircumvention rules limit the user's ability to make copies, which effectively precludes users from benefitting from the first sale doctrine.[108]

A few commenters stated that the rules against circumvention have little or no effect on the first sale doctrine. One commenter, for example, opined that such rules are irrelevant because they are essentially unenforceable.[109] Others argued that it is simply too soon in the evolution of this field to know.[110] They noted, however, that with time that condition may change.

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[103] C-Library Ass'ns, at 4-7.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 10-19.

[107] *Id.*

[108] C-Van De Walker, at 2.

A significant number of commenters expressed the view that prohibitions on circumvention of technological protection measures, particularly in the online environment, have had no effect on the operation of the first sale doctrine because the first sale doctrine is inapplicable to digital transmissions.[111] Several of these comments sought to respond to the concerns previously mentioned. For example, one commenter argued that concerns about copyright owners locking up works behind technological protection measures are without merit, because doing so would be a doomed business strategy.[112] That commenter also argued that the licensing of DVD players in no way disadvantaged consumers.[113] Further, that commenter asserted that analysis of the effect of licensing terms is beyond the scope of this Report.[114]

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[109] C-Stanford Linear Accelerator Center (SLAC), at 1.

[110] C-Digital Media Association (DiMA), at 7-9; C-Anthony, at 1.

[111] *E.g.*, R-Reed Elsevier Inc., at 5-8.

[112] R-Time Warner Inc., at 1-2.

[113] *Id.* at 2.

[114] *Id.* at 4.

2. The Effect of Section 1202 Prohibitions on the Operation of the First Sale Doctrine

The overwhelming number of commenters that expressed a view on this issue stated that there has not been any effect on the operation of the first sale doctrine as a result of the protections for copyright management information.[115] However, the library associations argued that when combined with technological protection measures and licensing limitations, copyright management information can give the copyright owner the ability to monitor and prohibit uses that are permissible under the law.[116] They were also concerned that such technology can give the copyright owner access to personal information about users, such as 'cookies',[117] that chills use of the work.[118] One commenter argued that protections for copyright management information limit the utility of the first sale doctrine because they prevent the owner of the copy from removing what he referred to as the "packaging" of the work.[119]

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[115] *See, e.g.*, C-SLAC, at 1; C-McGown, at 1; C-DiMA, at 9.

[116] C-Library Ass'ns, at 7-10.

[117] A "cookie" is information that is stored by Internet browsing software on a user's hard drive in response to an automated request by a web server. A subsequent automated request by a web server can instruct the browsing software to transmit that information back to the server.

[118] C-Library Ass'ns, at 7-10.

[119] C-Thomason, at 1.

3. The Effect of the Development of Electronic Commerce and Associated Technology on the Operation of the First Sale Doctrine.

One commenter simply found that the development of electronic commerce and associated technology has had no effect on the first sale doctrine.[120] Another believed that it was too soon to tell what the effect will be.[121]

The library associations argued that with the increase in distribution of copyrighted works online, it is less likely that a user will purchase a copy. Rather, they foresee that the user will be licensed to access a work online.[122] One result of this change, they argued, is that the first sale doctrine will not apply to online access.[123] They also argued that it permits copyright owners to create a price structure wherein entities that cannot afford the best version of the work must settle for a less expensive and less desirable version.[124]

Other commenters took that sentiment further, arguing that particularly in the e-commerce sphere, technology can now be used by copyright owners to circumvent constitutional and legislative limitations on the distribution right to the point of copyright misuse and/or antitrust violations.[125]

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[120] C-McGown, at 1.

[121] C-DiMA, at 9-11.

[122] C-Library Ass'ns, at 10-19.

[123] *Id.*

[124] *Id.*

[125] *See* C-NARM/VSDA, at 29-30, 37.

One copyright owner commented that new technology has made infringement of copyright easier and that a change in the existing level of protection for copyrighted works (such as expanded first sale privilege) could be disastrous for copyright owners.[126]

4. The Relationship Between Existing and Emergent Technology, on One Hand, and the First Sale Doctrine, on the Other

Relatively few commenters addressed this issue directly. Of those who did, most commenters believed that there is no relationship between existing and emergent technology and the first sale doctrine.[127] Some argued that technology is being used to defeat the first sale doctrine, as discussed above.[128] Another commenter noted that the first sale doctrine applies to tangible copies, not to the streaming or downloading of works.[129]

5. The Extent to Which the First Sale Doctrine Is Related To, or Premised On, Particular Media or Methods of Distribution

Many comments indicated that the first sale doctrine is not premised on any particular media or methods of distribution.[130] Some noted that the first sale doctrine is premised on older technology which provided greater impediments to the transfer of works than modern technology.[131] Others observed that the first sale doctrine is based on tangible copies.[132]

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[126] R-Time Warner Inc., at 1.

[127] *E.g.*, C-McGown, at 1; C-Library Ass'ns, at 19.

[128] C-Library Ass'ns, at 10-19.

[129] C-Time Warner Inc., at 2-3.

[130] *E.g.*, C-McGown, at 1; C-Taylor, at 5.

6. The Extent, if Any, to Which the Emergence of New Technologies Alters the Technological Premises upon Which the First Sale Doctrine Is Established

As with the previous issues, many of the commenters indicated that new technology does not alter the technological premises upon which the first sale doctrine is established. One commenter stated that new technology has made copyright laws obsolete and ineffective because of the impossibility of enforcement.[133] Several commenters noted that while new technology has not altered the premises of the first sale doctrine, the legislative codification of that doctrine may need to be periodically updated to continue the proper application of the first sale doctrine to new technology.

7. The Need, if Any, to Expand the First Sale Doctrine to Apply to Digital Transmissions

The comments on this issue were both voluminous and passionate. They can be divided into two starkly contrasting groups: those arguing that section 109 should be amended to permit the digital transmission of works that were lawfully acquired (including the reproduction of the work as a part of the transmission process) and those opposing modification of section 109.

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[131] C-SIIA, at 6; C-SLAC, at 2.

[132] C-Time Warner Inc., at 3; C-Anthony, at 2-3.

[133] C-SLAC, at 2-3.

Some of the commenters argued that digital transmissions are already permitted by the existing language of section 109.[134] This is because in obtaining the "source" copy, a user receives a transmission and upon completion of that transmission, there exists a copy of the work in tangible form. They dismissed concerns about additional copies being made when the first purchaser transmits the work to a second as being incidental to the transmission process. A legislative change that they seek is to amend section 1201 to allow circumvention of technological protection measures which prevent the operation of the first sale doctrine.[135]

Other commenters argued that the current language of section 109 could be read to apply to digital transmissions (although some conceded that a "formalistic" reading of section 109 does not), but sought legislative clarification to codify this conclusion.[136] Many commenters referred to the Boucher-Campbell bill[137] as a model for the changes they would like to see made to section 109.[138]

The commenters supporting changes to section 109 argued that copyright law has always been interpreted to be technology neutral, and that in order to be faithful to that tradition, the first sale doctrine should be updated to apply to digital transmissions.[139] They noted that the policy behind the first sale doctrine was to prevent restraints on the alienability of property in order to promote the continual flow of property in society.[140] They argued further that the first sale doctrine has, for nearly a century, promoted economic growth and creativity, and should be extended into the digital environment.[141] In anticipation of counter-arguments that such an extension would be an invitation to infringement, they argued that technological protection measures and copyright management information can be used in concert to guarantee that when a user transmits the work, the "source" copy is deleted.[142] They also asserted that this technology exists now. Additionally, some argued that without a clear application of the first sale doctrine to digital transmissions, circumvention technology will gain in popularity.[143]

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[134] C-NARM/VSDA, at 36-37.

[135] *Id.*

[136] R-Library Ass'ns, at 1-2.

[137] H.R. 3048, 105th Cong., 1st Sess. (1997).

[138] *E.g.*, C-Digital Future Coalition (DFC), at 3.

[139] *Id.*

The library associations sought specific amendments to section 109 to address the concerns unique to libraries relating to interlibrary loans, preservation/archiving, accepting donated works, and other activities.[144]

There were a few other views supporting such a change as well. One commenter argued that while the copyright law is no longer relevant and the expansion of section 109 is not technologically necessary, the principles of copyright law should apply evenly.[145] Another commented that first sale principles should also apply to the transmission of encryption "keys" so as to prevent technological protection measures from inhibiting exercise of the first sale right while still providing protection against infringement.[146]

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[140] C-NARM /VSDA, at 9.

[141] C-Home Recording Rights Coalition (HRRC), at 2-3.

[142] *Id.* at 5.

[143] R-DiMA, at 6-7.

[144] C-Library Ass'ns, at 11-19.

[145] C-SLAC, at 3.

Those who opposed the amendment of section 109 argued that the requested changes do not merely update the long-standing first sale doctrine to accommodate new technology, but expand the first sale doctrine well beyond its previous scope.[147] To date, the first sale doctrine has, with limited exceptions,[148] always been a limitation on only the distribution right. Commenters from the copyright industries noted that in order to transfer a copy of a work from one person to another by digital transmission it is necessary for copies to be made, thus implicating the reproduction right.[149] They asserted too that the transfer may also involve a performance of the work, implicating the public performance right or for sound recordings, the digital audio transmission right.[150]

Those opposed to amending section 109 also argued that a change along the lines proposed in the Boucher-Campbell bill would open the door to widespread unauthorized copying of works which, in turn, would destroy the market for those works.[151] They argued that this result could occur because the technology to require simultaneous destruction of the "source" copy remains ineffective and prohibitively expensive.[152] Moreover, at least one copyright owner representative questioned the existence of any demand in the marketplace for the simultaneous destruction (also called "forward and delete") technology.[153] Opponents also argued that in the context of traditional technology, the effect of the first sale doctrine on the marketplace for unused copies was limited by geography and the gradual degradation of books and analog tapes.[154] The absence of such limitations in the context of digital technology would cause an expanded first sale doctrine to have a far greater effect on the market.[155] They also noted that copyright owners'concerns raised in the context of this Report were precisely the same concerns that persuaded the Congress not to enact the Boucher-Campbell bill in the 105th Congress, and that nothing has changed that should alter Congress' judgment.[156]

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[146] C-Thau and Taylor, at 6.

[147] C-SIIA, at 3.

[148] *See* § 109(c) (limiting the public display right) and § 109(e) (limiting the public performance and public display rights). These provisions are discussed *supra*, at 25.

[149] R-American Film Marketing Association, Association of American Publishers, Business Software Alliance, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America (Copyright Industry Orgs.), at 2.

[150] *Id.* at 5.

8. The Effect of the Absence of a Digital First Sale Doctrine on the Marketplace for Works in Digital Form

For those who seek an amendment to section 109 to include digital transmissions explicitly in the first sale doctrine, the absence of express statutory language is a source of uncertainty, reduced utility and/or a chilling effect on users in the marketplace, which is reducing the demand for copyrighted works.[157]

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[151] *E.g.*, R-Time Warner Inc., at 1.

[152] R-Copyright Industry Orgs., at 3-4.

[153] T-National Music Publishers' Association (NMPA), Mann, at 157-58.

[154] R-SIIA, at 6.

[155] *Id.*

[156] R-NMPA, at 2-3.

To those who oppose such an amendment, the current law provides an environment in which copyright owners are willing to offer their works in a digital form.[158] This, they argued, enhances the market for such works by providing them to consumers in the media they desire most. To counter claims that the absence of a clear application of the first sale doctrine to digital transmissions is harming the marketplace, one commenter quoted a 1997 U.S. Department of Commerce study asserting that "electronic shopping and mail order houses sold $22.9 billion in computer hardware, software, and supplies . . . more than any other types of retail businesses."[159] Another noted that according to Jupiter Communications, digital downloads will be a $1.5 billion commercial market by 2006.[160]

C. VIEWS CONCERNING SECTION 117

The public comments related to section 117 fell broadly into two categories: comments concerning the status of temporary copies in RAM and comments concerning the scope of the archival exemption.

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[157] C-Library Ass'ns, at 25-26; C-DiMA, at 13.

[158] *E.g.*, C-Time Warner Inc., at 3.

[159] R-SIIA, at 5.

[160] R-Broadcast Music, Inc. (BMI), at 6-7.

1. Exemption for Temporary Buffer Copies in Random Access Memory (RAM)

a. *Legal Status of Temporary Copies and Need for an Exception.*

Most of the comments received on "section 117" related not to the computer program exemptions provided in that section, but to the question whether an exemption for temporary incidental copies should be enacted. One group of commenters requested an exemption from the exclusive right of reproduction for certain kinds of temporary copies.[161] Another group of commenters, mostly comprised of copyright owners, did not believe there is any need or basis for an exemption for these temporary copies.[162]

Many of the commenters who support an amendment to create a general exception from the reproduction right for temporary incidental copies supported the exemption proposed in the Boucher-Campbell bill.[163] This bill included an exemption for digital copies that are incidental to the operation of a device in the course of use of a work when that use is lawful under title 17, U.S. Code. Because this exemption was originally proposed as an amendment to section 117, we discuss it in the context of section 117.[164]

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[161] *See generally* comments by Computer & Communications Industry Association (CCIA), DFC, HRRC, DiMA (suggesting similar but different wording), Blue Spike, Launch; *see also* R-Library Ass'ns, at 15-16.

[162] *See generally* comments by NARM and VSDA, Digital Commerce Coalition (DCC), Business Software Alliance (BSA), BMI, Copyright Industry Orgs., Reed Elsevier, Inc. (REI).

[163] H.R. 3048, 105th Cong., (1997); *see* discussion *supra* at 15.

[164] *See* discussion of the nexus between the temporary incidental copy issue and section 117 *supra* at 18.

The proponents of a temporary incidental copy exception argued that court decisions like *MAI Systems Corp. v. Peak Computer, Inc.*[165] and its progeny, have had the effect of invalidating the usefulness of the exemptions under section 117.[166] *MAI v. Peak* held that the loading of software into a computer's random access memory (RAM) in violation of a license agreement was an infringement because it entailed making a copy.[167] The exemption in section 117 applies to "the owner of a copy of a computer program."[168] The court in *MAI v. Peak* concluded that since the software was licensed by the copyright owner, the defendant, a third-party independent service oganization, was not an "owner" of the software and did not qualify for the exemptions under section 117.[169] The commenters argued that because most software today is acquired by license rather than purchase, few users of computer software would qualify for the exemption under section 117. Therefore, they contended, it is of little use.[170]

Other commenters generally opposed any exemption for temporary incidental copies at this time.[171] Many of them opposed the Boucher-Campbell bill, arguing that the proposed exemption is not justified by technological developments, would dramatically expand the scope of section 117, and would drastically cut back on the exclusive reproduction right for all works.[172] In their view, the *MAI v. Peak* decision stands for two propositions relevant to section 117, both of which buttress, rather than weaken or "repeal" that statutory provision and the objectives for which it was enacted.[173] First, the Ninth Circuit's holding in *MAI v. Peak* has been followed in a number of other federal court decisions.[174] The copyright owners also argued that if the Ninth Circuit had reached the opposite conclusion – that such copying of a computer program into memory was not a reproduction falling within the scope of the reproduction right – enactment of what is now section 117(a)(1) would not have been necessary.[175] Second, the copyright owners argued that proponents of the Boucher-Campbell bill called on Congress in 1998 to overturn *MAI v. Peak* by adopting an exception for incidental copies, but that Congress did the opposite by passing title III of the DMCA, endorsing and reaffirming the conclusions of CONTU and the Ninth Circuit regarding temporary copies.[176] The copyright owners, joined by other commenters, argued that the DMCA embraced the general principle that temporary copies in RAM are copies that are subject to the copyright owner's exclusive reproduction right, and made only those carefully calibrated adjustments to the principle necessary to address the problems experienced by independent providers of computer maintenance and repair services.[177]

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[165] 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994).

[166] The DFC argues, for instance, that the practical force of the section 117 exemptions has been deprived by recent case law, citing *MAI v. Peak* and subsequent decisions that hold that every temporary RAM copying of a computer program, incidental to its use on a hardware platform, constitutes a form of "reproduction". C-DFC, at 3. CCIA said that the existing 117 has "in essence . . . been repealed" by *MAI v. Peak* and decisions like it. C-CCIA, at 2.

[167] *See* discussion of *MAI v. Peak infra* at 118.

[168] 17 U.S.C. § 117(a)(1).

[169] 991 F.2d 511, 518 n. 5 (9th Cir. 1993).

[170] This argument appears to be less relevant to the proposal for a general exemption for temporary incidental copies, than to the question whether the existing exemptions under section 117 should apply only to "owners" of copies or to "rightful possessors" including licensees.

[171] *See generally* comments by the Copyright Industry Orgs., NMPA, and SIIA; T-BMI, Berenson, at 167.

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[172] R-Copyright Industry Orgs., at 9.

[173] *Id.*

[174] *See infra* at 119.

[175] R-Copyright Industry Orgs., at 9; *see infra*, at 113.

[176] *Id.*

[177] R-Copyright Industry Orgs., at 10.

The copyright owners were also concerned that an exception for incidental copies would undercut the reproduction right in all works, and would raise significant questions about U.S. compliance with its international obligations.[178]

b. *The Economic Value of Temporary Copies*

Commenters were divided on the question whether temporary copies have economic value. The point of view of the commenters appeared to be strongly influenced by the context in which the particular temporary copy is made. Some commenters who discussed temporary copies that are incidental to an authorized transmission placed little or no economic value on the copies. The small temporary buffer memory copies that are used in today's webcasting technology, argued one commenter, have no intrinsic or economic value apart from the performance.[179] This commenter, representing an alliance of companies that develop and deploy technologies to perform, promote and market music and video content on the web and through other digital networks, noted that this webcasting technology demonstrates why section 117 needs to be updated for the digital age. He said that it should provide that the temporary buffers necessary to enable an authorized performance of copyrighted material are exempt from any claim of copyright infringement.[180]

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[178] WST-Copyright Industry Orgs.

[179] C-DiMA, at 19.

[180] *Id.*

Other commenters argued that the temporary copy has significant economic value.[181] These commenters referred to the holding in *MAI v. Peak*, and its subsequent confirmation by Congress in title III of the DMCA, as an implicit recognition that the copies have economic value since Congress deemed them worthy of protection.[182] Indeed, one commenter from a trade association that represents software and electronic commerce developers asserted that in the digital world it is possible that the full commercial value of the work is contained in that temporary copy. For example, customers are becoming less interested in possessing a permanent copy of software, and more interested in having that copy available to them as they need it.[183]

c. *Promotion of Electronic Commerce*

Some commenters asserted that the promotion and growth of electronic commerce requires a general exception for temporary incidental copies to cover all forms of digital content, not just computer software.[184]

Opposing that view was one commenter who noted that there is every indication from the marketplace to suggest that electronic commerce and the Internet continue to grow vigorously, and that in the two years since the enactment of the DMCA that growth has accelerated.[185] The commenter concluded that the evidence is simply not there to support the thesis that exemptions must be expanded to meet the demands of electronic commerce.[186] Copyright industries did not believe any changes to section 117 were necessary at this time in order to facilitate the continued growth of electronic commerce and the advance of technology for conducting electronic transactions in copyrighted materials. They professed to be unaware of any significant impediments to electronic commerce which have arisen as a result of section 117 in its current form.

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[181] *See generally* comments by Copyright Industry Orgs., BSA.

[182] R-Copyright Industry Orgs., at 9; T-BSA, Simon, at 105.

[183] T-BSA, Simon, at 138.

[184] C-DiMA, at 15; WST-HRRC ; R-Library Ass'ns, at 14.

[185] T-BSA, Simon, at 105.

d. *Changed Circumstances since Enactment of the DMCA*

A representative of the copyright industry associations observed that when Congress has dealt with the question of temporary copies, it has done so in response to real problems.[187] He noted that Congress responded in 1998 to real problems that were presented to it by independent service organizations that had been sued and were being held liable for creating temporary copies in RAM in the course of maintaining or repairing computers.[188] Congress, he also noted, took the same approach when it was presented with evidence that there was at least a credible threat of liability for online service providers, for making temporary copies in the course of carrying out functions that are at the core of the Internet.[189]

Several commenters spoke directly to this issue by addressing what has changed in the past two years that would require an exemption from the reproduction right for certain temporary copies and what additional experience has been gained over the past two years that may persuade Congress to rethink these issues. One commenter remarked that the test that should be considered is whether something has happened to the marketplace that would justify further changes in law.[190] He noted that Congress found no compelling evidence in 1998 that changes were merited, and having reviewed the submissions and marketplace developments, he found that there is no justification to come to a different conclusion today.[191]

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[186] *Id.*

[187] T-Copyright Industry Orgs., Metalitz, at 249.

[188] *Id; see supra*, at 30.

[189] T-Copyright Industry Orgs., Metalitz, at 249; *see infra*, note 201.

Still another commenter argued that an amendment to section 117 to exempt temporary copies of works that are made as part of the operation of the machine or device is not necessary and would be inappropriate because no one can provide any evidence of harm.[192] This commenter asserted that no concrete examples had been proffered of situations where copyright owners have filed suit or otherwise made inappropriate claims based on such temporary copies or where webcasters have been hampered by any alleged threats. He was not aware of any record company that has claimed infringement or threatened litigation based on the making of temporary copies. To the contrary, he provided examples of webcasters and other Internet music services being licensed by copyright owners with all the permissions they need to operate their business. Need for legislative action on this point, he said, has not been demonstrated and none should be taken where the likelihood of unintended consequences is high.[193]

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[190] T-BSA, Simon, at 105.

[191] *Id.*

[192] T-RIAA, Sherman, at 305.

[193] *Id.*

Other commenters, however, argued the problem was not theoretical. One webcaster noted that there are music publishers that are seeking mechanical royalties for temporary copies made in RAM buffers when music is streamed on the Internet, even though the performance to which the copy is incidental is fully licensed.[194] He noted that his company had not been sued but certainly had been threatened, and the threat of suit had been used against it in negotiations over license agreements.[195] The commenter said the threat of litigation, particularly to a growing company like his, is enough to cause problems, and is enough to make such a company agree to licenses that are, perhaps, unfair.[196] He also noted that it is not in anyone's interest to resolve a perceived ambiguity through litigation; this is a clear example of an instance in which legislative action could effectively resolve any uncertainty.[197]

e. *Applicability of the Fair Use Doctrine to Temporary Copies*

Suggestions were made in the comments that the fair use doctrine, rather than a separate exemption for temporary incidental copies, could address some of the concerns that were raised about such copies. Since certain commenters proposed that language be added to section 117 that would permit the making of temporary copies when such copies are "incidental to the operation of a device . . ." and do "not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author," one commenter suggested instead that the fair use doctrine be used rather than expanding section 117 with such broad language. This commenter argued that this language is too broad and use of it may be dangerous by allowing acts well above and beyond any reasonable fair use.[198]

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[194] T-Launch, Goldberg, at 311.

[195] Launch has since been sued, but over issues unrelated to buffer copies.

[196] T-Launch, Goldberg, at 311.

[197] WST-Launch.

One of the commenters advocating an exemption for temporary incidental copies also recognized that fair use may address some of the concerns that were expressed. This commenter took the position that between the archival exemption set out in section 117 and the fair use doctrine, certain types of copies should already be determined not to be infringing under the law, including temporary copies of recorded content made in the course of playback through buffering, caching, or other means.[199] Library associations said that while they believe that the copying rights at issue already exist under fair use, making them explicit could help to eliminate some of the uncertainty that is currently preventing these rights from being fully and consistently exercised.[200]

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[198] R-SIIA, at 3, 4; WST-SIIA; T-SIIA, Kupferschmid, at 132.

[199] WST-HRRC. The copies that HRRC asserts should already be determined not to be infringing under the law (because the copies fall under the archival exemption set out in section 117 or the fair use doctrine) are back-up or archival copies of works or phonorecords of content lawfully acquired through digital downloading; temporary copies of recorded content made in the course of playback through buffering, caching, or other means; and temporary copies that are stored through the technical process of Internet webcasting.

[200] R-Library Ass'ns, at 14.

f. *Liability for Making Temporary Copies under Section 512*[201]

The copyright industries questioned why the limitations on liability set out in section 512 cannot be used by the webcasters to address their problems regarding threats of litigation and noted that there have not been significant legal conflicts over incidental copying.[202] The copyright industries asserted that Congress, in enacting the DMCA, addressed and resolved some of the potential flash points. For instance, they asserted that, in what is now section 512, Congress carefully fashioned limitations on remedies that apply to infringements – including, notably "incidental copying" – that may occur in the course of activities that are essential to the smooth functioning of the Internet such as linking, storing, caching or providing conduit services, rather than creating broad exemptions to exclusive rights.[203]

Other commenters disagreed. One noted that the section 512 provisions are helpful to those who qualify as Internet service providers within the meaning of section 512 but that many webcasters are not Internet service providers and do not qualify for relief from liability under section 512.[204] Another commenter agreed that section 512 can be extremely helpful for intermediaries, but asserted that it does not solve the particular problem for Internet webcasters and Internet broadcasters who are the originators of the transmissions.[205]

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[201] 17 U.S.C. § 512. Under section 512, a party that qualifies as a "service provider" may be eligible for one or more of four limitations on monetary liability for copyright infringement deriving from specified activities. For purposes of the first limitation, relating to transitory communications, "service provider" is defined in section 512(k)(1)(A) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." For purposes of the other three limitations relating to system caching, hosting, and information location tools, "service provider" is more broadly defined in section 512(k)(l)(B) as "a provider of online services or network access, or the operator of facilities therefor."

In addition, to be eligible for any of the limitations, a service provider must meet two overall conditions: (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must accommodate and not interfere with "standard technical measures" as defined in section 512(i).

[202] T-Copyright Industry Orgs., Metalitz, at 247.

[203] R-Copyright Industry Orgs., at 10-11.

2. Scope of the Archival Exemption

a. *Expansion of the Archival Exemption to Works Other than Computer Programs*

Although most comments received on section 117 related to an exemption for temporary copies, a number of commenters discussed the scope of section 117's archival exemption. One commented that it supports amending section 117 to allow owners of any digitally-acquired content (i.e., not just computer programs) the right to make an archival or backup copy;[206] that consumers may wish to make removable archive copies of downloaded music and video to protect their downloads against losses; and that despite the convenience of digital downloading, media collections on hard drives are vulnerable.[207] This commenter noted, for example, that when a consumer wants to upgrade to a new computer or a more capacious hard disk drive, there is no lawful means to transfer the consumer's media collection onto new equipment.

This point was echoed by other commenters who said that section 117 is too narrow and, in addition to computer programs, should apply to other works due to the fact that CDs can erode and DVDs can also develop similar problems.[208] Another commenter representing the library associations said that more categories of works are now being published in digital formats and that section 117 should be updated to clarify that the rights apply to all rightfully possessed digital media.[209] The library associations went on to say that all digital content is prone to deletion, corruption, and loss due to system crashes and that consumers must be permitted to protect their investments; thus it is critical to recognize that archival copying rights are as important today to the growth of digital publishing as they were to the growth of the computer software industry in the 1980s.[210]

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[204] T-DFC, Jaszi, at 273-74.

[205] T-DiMA, Greenstein, at 274.

[206] The copyright industry organizations pointed out in reply comments that DiMA believes this narrow exception to section 117(a)(2) should be expanded to cover any "content that [consumers] lawfully acquire through digital downloading." R-Copyright Industry Orgs., at 12.

[207] T-DiMA, Greenstein, at 238-39.

On the other side was a trade association for the software and information industries. This association suggested that an expansion of section 117 to other copyrighted works is senseless because it is being used so sparingly today for computer software and the justification for the provision no longer exists.[211]

This same trade association expressed the view that the public perception of the scope of the section 117 backup copy exception may be distorted, and that persons engaged in piracy of software and other content assert they can justify their actions by relying on section 117. That commenter contended, for example, that persons attempting to auction off their so-called backup copies of computer software or who make pirated software available on websites, ftp sites or chat rooms, do so under the guise of the section 117 backup copy exception.[212]

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[208] C-Antony, at 4-5.

[209] R-Library Ass'ns, at 11. "Many types of works that were formerly distributed in print and analog formats are now being distributed only in digital format." *Id.* at 14.

[210] *Id.* at 15.

[211] R-SIIA, at 9.

A trade association representing publishers of video and computer games stated that section 117 is used, not as a legitimate defense to infringement, but as an enticement to engage in piracy.[213] It asserted that, despite the diminishing need for an archival copy exception to protect any legitimate interest of users of computer programs, and the lack of any judicial precedent for expanding the scope of section 117(a)(2), the Internet is replete with sites purporting to offer "backup copies" of videogames containing computer programs, or the means for making them.[214] It contended that many of these sites specifically refer to section 117 as providing a legal basis for their operations; for example, one website offering such 'backup copies' reassures users that "under the copyright laws of the U.S., you are entitled to own a backup of any software you have paid for," while another proclaims: "All the games, music cd's, and computer software that you will find on this page for sale are copied because it is perfectly legal by Section 117 of the US Copyright Law, to own these cd's and use them as long as you have the original program, game, or music cd."[215] In fact, according to this commenter, these sites are not actually offering "backup copies" or even copies that they rightfully own, and in any event they offer works other than computer programs. The commenter asserted that such sites "refer to section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction – a download of pirate product – might in fact somehow be lawful.

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[212] C-SIIA, at 3-4.

[213] C-Interactive Digital Software Association (IDSA), at 5.

[214] *Id.*

[215] *Id.*

The same commenter recommended that the language of section 117(a)(2) be narrowed to make it clear that the provision does not allow a free-standing market in so-called "backup copies," and that it only covers the copying of computer programs to the extent required to prevent loss of use of the program when the original is damaged or destroyed due to electrical or mechanical failures. It asserted that such a statutory adjustment would not only accurately reflect the changes wrought by two decades of technological advancement, but would also promote legitimate electronic commerce. Perhaps most importantly, such an adjustment would eliminate much of the confusion created in the minds of some users by those who justify their piratical activities by reference to a supposed "right" to make "back up copies" of entertainment software products.[216]

b. *Clarification of the Archival Copy Exemption for Computer Programs*

One commenter noted that section 117 does not comport with normal practices and procedures that people use for archiving information on computers.[217] He asserted that while most businesses, and many individuals, perform periodic backups of everything on their hard drive, section 117 prescribes a different style of archiving: making a copy of an individual program at the time the consumer obtains it.[218]

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[216] *Id.* at 6.

[217] WST-Hollaar.

In this case, the commenter advised, the archival copy will not only contain copied data, but also copied commercial software that happened to be installed on the hard drive. Not only is the program copied but also data that came along with the program, even though section 117 does not give permission to copy that data.[219]

If the use of a particular program ceases to be rightful (primarily because the user has obtained a new version of the program – perhaps an upgraded version) the user no longer has the right to use it, but rather has the right to use the new program. The user most likely will not go back, find the CD-ROM that includes the archived data and programs and try to attempt in some way to delete the programs from the CD. Section 117, noted the commenter, does not match the reality of how file archives are made today.[220]

Another commenter agreed and said multiple backup copies are needed; programs that perform backups have no knowledge of the license status of the computer files being backed up and there is no commonly used file system that stores such status with the files, so that there is no way (within common practice) for backup programs to ascertain that status.[221] He also explained that periodic backups are made according to schedules, and to enable recovery. For example, backups may be made daily, weekly, monthly, yearly. Each tape (of the "full backup" type) would contain a copy. Although tapes are generally recycled, there are often legitimate reasons to preserve tapes.[222]

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[218] *Id.*

[219] *Id.* at 93-95.

[220] *Id.*

[221] C-LXNY, at 1.

In response to the question whether there is any evidence of actual harm resulting from this mismatch between section 117 and the way system administrators or others actually backup network systems, most commenters were not aware of any harm that had resulted in this mismatch.[223] One commenter expressed concern that when the law is so far out of step with reality that it is seldom, if ever, observed, respect for the legal system diminishes and the rule of law suffers.[224]

However, one commenter did not agree that archiving backup copies necessarily amounted to a violation of section 117. He pointed out that it would be necessary to look at section 107, stating that if the activity does not fall within the specific terms of section 117, then it may be permissible under the fair use doctrine.[225] Another commenter agreed that there was a mismatch, but questioned what the practical effect of this mismatch is. No one has been sued for backing up material that may fall outside the scope of Section 117. The commenter noted that the mission of the Report is to respond to real problems. He referred to the comment submitted by the Interactive Digital Software Association, which reported that one of the easiest ways to find pirated videogames online is to search for the term "section 117," since many websites offering pirated products refer, incorrectly, to that provision as legitimizing their conduct.[226]

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[222] *Id.*

[223] *Id.* at 129.

[224] *Id.* at 95.

[225] T-SIIA, Kupferschmid, at 148.

D. VIEWS ON MISCELLANEOUS TOPICS

A number of public comments that we received addressed issues that are not directly related to section 109 or section 117. These miscellaneous views are summarized below.

1. Effect of Technological Protection Measures and Rights Management Information on Access to Works, Fair Use, and Other Noninfringing Uses.

There were many comments relating to the effects on noninfringing uses of works of technological protection measures used by copyright owners to protect their works from unauthorized access or copying. The library associations argued that it is not in the public interest to introduce legal and technological measures that diminish, if not eliminate, otherwise lawful uses.[227] The public, they asserted, now must face licensing barriers (contractual restrictions) and legal barriers (criminal penalties for circumvention) to both private and public lending and use.[228] They fear that it will remain illegal for a library or a user to circumvent technical protection measures in order to use the underlying works in ways that have traditionally been permitted under the first sale doctrine, fair use and exemptions for preservation.[229]

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[226] T-Copyright Industry Orgs., Metalitz, at 249.

[227] T-Library Ass'ns, Petersen, at 23.

[228] C-Library Ass'ns, at 4.

[229] *Id.* at 2.

The DMCA was criticized by another commenter because he said it prohibits circumvention of access control devices without requiring that the devices serve only their primary purpose.[230] This commenter believes the DMCA should not allow access control devices to act as a single entry point to a technology, thereby creating an artificially privileged group of technology providers in the market.[231]

Another commenter reached the opposite conclusion based on the premise that technological protection measures are largely ineffective. This commenter noted that despite the current illegality of circumventing technological protection measures, these measures are routinely defeated, concluding that, in practice, the law has not had a significant effect on controlling copying and distribution of digital works.[232]

Some commenters expressed concern with the effects on a user's ability to use copyrighted material under the fair use provisions when anticircumvention devices are employed. More broadly, one commenter opined that the pendulum has swung too far in the interest of copyright owners and has begun to trample the needs and rights of the copyright users.[233] The library associations noted that many librarians are reluctant to make fair use judgment calls due to accountability imposed by CMI technologies and criminal sanctions; where uncertainty about permissible use exists, liability concerns may lead librarians to forego uses that are actually permitted under license and law.[234]

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[230] C-Fischer, at 1-2.

[231] *Id.*

[232] C-SLAC, at 1-5.

[233] C-Beard, at 1-3.

Another comment regarding the anti-circumvention provisions of the DMCA related to the implementation of the Secure Digital Music Initiative (SDMI) and similar technologies that could deprive educators and researchers of access to music.[235] The commenter noted that access to music under traditional notions of fair use has always been a part of our nation's cultural and legal history.[236]

2. Privacy

The library associations expressed concern for privacy rights and noted that, with copyright management information, content owners have the ability to track ongoing use of works in digital form, and to monitor who is looking at a work and exactly what the users are doing with it despite Congress' efforts to protect privacy in the DMCA.[237] They went on to say that although the DMCA's definition of CMI specifically excludes any personally identifying information about a user of a work or a copy,[238] the way CMI technologies are actually implemented may result in the compilation and tracking of usage information.[239]

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[234] C-Library Ass'ns, at 8.

[235] C-Future of Music Coalition, at 3.

[236] *Id.*

[237] C-Library Ass'ns, at 8.

[238] 17 U.S.C. § 1202(c).

[239] C-Library Ass'ns, at 8.

Another commenter noted a threat to the right to privacy since copyright holders may invade the privacy of citizens attempting to communicate privately with one another on the grounds that "violations" or "infringements" may be occurring.[240] This may lead government, said the commenter, to routine monitoring of its own citizens' communications in order to prevent the transmission of "unlicensed" information.[241]

3. Contract Preemption and Licensing

Many comments raised in both written and oral testimony related to contract preemption and licensing issues. The library associations argued that the first-sale doctrine is being undermined by contract and restrictive licensing which results in uncertainty about the application of the first sale doctrine for copies of works in digital form.[242] They noted the trend towards the displacement of provisions of the uniform federal law — the Copyright Act — with licenses or contracts for digital information. The library associations asserted that college and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of licenses.[243]

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[240] C-Darr, at 2.

[241] *Id.*

[242] T-Library Ass'ns, Neal, at 16.

[243] *Id.* T-Library Ass'ns., Petersen, at 23.

Another commenter argued that the case law is in disarray concerning the effectiveness of contractual terms contained in so-called "shrink-wrap" and "click-through" licenses[244] that override consumer privileges codified in the Copyright Act. This commenter proposed that section 301 of the Copyright Act[245] be amended to provide a clear statement of the supremacy of federal copyright law provisions providing for consumer privileges over state contract rules.[246] The library associations agreed with this view. Publishers responded to this line of argumentation by characterizing it as a licensing issue, not a first-sale issue.[247] The publishers noted that Congress did not intend copyright law broadly to preempt contract provisions, citing the example of section 108(f)(4) which provides that despite the privileges otherwise provided to libraries and archives under section 108, nothing in the section is to affect any contractual obligations assumed at any time by a library or archives when it obtained a copy of a work in its collections. These privileges for libraries, according to the publishers, were written to take account of the fact that contractual licensing was going to be the primary way in which copyright owners were going exploit the rights provided to them under the law.[248] Another commenter pointed out that it is a long accepted principle of American jurisprudence that parties should be free to form contracts as they see fit.[249]

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[244] *See supra*, note 100.

[245] 17 U.S.C. § 301. Section 301 establishes the scope of federal preemption under the Copyright Act. *See infra*, at 162.

[246] C-DFC, at 3; T-DFC, Jaszi, at 228.

[247] T-AAP, Adler, at 31, 32.

[248] *Id.*

[249] R-DCC, at 4.

Some commenters discussed UCITA in this context and noted that, as with the Uniform Commercial Code and other uniform state laws, UCITA is intended to help facilitate electronic commerce.[250] Concern was expressed that UCITA ignores the supremacy of federal law, and, again, recommendations were made to amend section 301. The library associations believe that ambiguity in the law harms libraries and has a stifling impact on library activities. As an example, they stated that it is unclear whether a librarian, on behalf of a patron, can secure and provide interlibrary loan copies or interlibrary loan delivery of works in this environment.[251]

4. Open Source Software

One commenter was concerned that amendments to section 109 may jeopardize the ability of open source and free software licensors to ensure that third-party transferees receive the entire product whose distribution was authorized by the licensor, including the software license rights.[252] Open source or free software licenses grant users the right to: (1) have the source code; (2) freely copy the software; (3) modify and make derivative works of the software; and (4) transfer or distribute the software in its original form or as a derivative work, without paying copyright license fees.[253] The entire open source model is premised on the enforceability of those license provisions.

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[250] R-DCC, at 1; *see supra*, note 38 and accompanying text.

[251] T-Library Ass'ns, Neal, at 55.

[252] T-Red Hat, Kunze, at 256, 257.

[253] WST-Red Hat.

5. Other DMCA Concerns

Several commenters expressed opposition to the DMCA for a variety of reasons. One commented that his right to communicate freely under the First Amendment was threatened by the DMCA because it broadened the definition and scope of copyright. This, in turn, resulted in frivolous cease and desist letters being sent to those attempting to exercise fair use and other exceptions.[254]

Another commenter expressed concern that the DMCA shifted the balance of power away from consumers and gave undue leverage to corporations.[255] This commenter believes that the DMCA has hampered progress and the rights of citizens by, for example, taking down websites without due process and condoning corporate behavior that does not support fair use.[256]

Concern was expressed over the distribution of monies relating to the digital performance right in sound recordings.[257] This commenter noted that the royalties should not be distributed in the "same unfair and inaccurate way" as monies are distributed under the current formula of the Audio Home Recording Act.

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[254] C-Darr, at 1.

[255] C-Jones, at 1.

[256] *Id.*

[257] C-Future of Music Coalition, at 2.

III. EVALUATION AND RECOMMENDATIONS

A. THE EFFECT OF TITLE I OF THE DMCA ON THE OPERATION OF SECTIONS 109 AND 117

We are not persuaded that title I of the DMCA has had a significant effect on the operation of sections 109 and 117 of title 17, apart from some isolated factual contexts that are discussed below. Many of the public comments received by us alleged that 17 U.S.C. § 1201, as enacted in title I of the DMCA,[258] is affecting the operation of sections 109 and 117[259] (while a significant number of others argued that it is not[260]). However, either the concerns raised cannot be accurately described as being "effects on the operation of" one of those sections, or if there is an effect on the operation of one of those sections, that effect can just as easily be ascribed to other factors (such as the existence of license terms) as to section 1201. Consequently, none of the legislative recommendations made in this Report are based on effects of section 1201 on the operation of sections 109 and 117.

1. The Effect of Section 1201 on the Operation of the First Sale Doctrine

a. *DVD Encryption*

Several commenters argued that section 1201's protection of CSS for DVDs against circumvention affects consumers' exercise of the first sale doctrine by enforcing technological limitations on the way DVDs can be used.[261] These commenters asserted that because CSS is proprietary technology that is licensed to device manufacturers under restrictive terms, the use of CSS limits the potential playback devices for DVDs, which, in turn, limits the potential market for resale of DVDs. Second, they argued that because licensed playback devices enforce region codes,[262] DVDs purchased in one region of the world cannot be as easily resold in other regions, again limiting the potential resale market.

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[258] No commenters indicated that any other provision of title I of the DMCA affected the operation of sections 109 and 117, and we are not aware of any issues relating to whether other provisions have an effect on those sections of the Copyright Act.

[259] See C-Fischer, C-DFC, C-NARM/VSDA.

[260] See C-Copyright Industry Orgs., C-Time Warner Inc.

[261] *See* C-Arromdee, C-Thau and Taylor.

This argument is without merit. The first sale doctrine codified in section 109 limits an author's distribution right so that subsequent disposition of a particular copy by its owner is not an infringement of copyright. The first sale doctrine does not guarantee the existence of a secondary market or a certain price for copies of copyrighted works. If fewer people may wish to purchase a used DVD, or if they would pay less for it due to CSS, that would not equate to interference with the operation of section 109. Many circumstances in the marketplace may affect the resale market for copies of works – improvements in technology, introduction of new formats, and the quality and cultural durability of the content of the work. None of these factors can properly be said to interfere with the operation of section 109, even though they could reduce the resale market for a work or even render it nonexistent.[263]

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[262] Each DVD bears an embedded region code corresponding to the region of the world where the particular DVD is authorized to be sold. Licensed DVD players will only play DVDs that are coded for the region where the player is sold. Region coding is used to prevent gray market importation of DVDs from one region to another.

[263] To the extent that there is a concern that region coding may limit the number of purchasers outside North America who are willing to buy region 1 DVDs (i.e., DVDs coded for sale within North America), that concern has nothing to do with section 1201. Section 1201 of title 17, United States Code, has no effect outside the United States. Consequently, a purchaser in Hong Kong could modify a region 6 player so that it could play a region 1 DVD without fear of any repercussions under section 1201 (although there may or may not be consequences under Hong Kong law). Moreover, resale outside the U.S. has nothing to do with section 109, which only governs resale within the United States.

Equally without merit is the argument – essentially a corollary to the guaranteed resale market argument – that the first sale doctrine gives consumers a right to use a DVD on any electronic device. In fact, virtually all devices capable of playing a DVD that are sold in the U.S. are compliant with CSS, so there is no real effect on the resale market as a result of the application of CSS technology. Further, this argument has nothing whatever to do with the privilege under section 109 to dispose of a copy of a work. Moreover, taken one step further, that argument would lead to the absurd result of requiring that consumers be able to play Beta videocassettes on VHS players, or VHS videocassettes on personal computers.

b. *Tethering Works to a Device*

A plausible argument can be made that section 1201 may have a negative effect on the operation of the first sale doctrine in the context of tethered copies – copies that are encrypted with a key that uses a unique feature of a particular device, such as a CPU identification number, to ensure that they cannot be used on any other device.[264] Even if a tethered copy is downloaded directly on to a removable medium such as a Zip™ disk or CD-RW, the content cannot be accessed on any device other than the device on which it was made. Disposition of the copy becomes a useless exercise, since the recipient will always receive nothing more than a useless piece of plastic. The only way of accessing the content on another device would be to circumvent the tethering technology, which would violate section 1201.

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[264] *See* C-CPSR, at 4-5.

The practice of using technological measures to tether a copy of a work to a particular hardware device does not appear to be widespread at the present time, at least outside the context of electronic books. We understand through informal discussions with industry that this technique is – or at least can be – employed in some cases with electronic books using digital rights management (DRM) technology. Given that DRM is in its relative infancy, and the use of DRM to tether works is not widespread, it is premature to consider any legislative change to mitigate the effect of tethered works on the first sale doctrine. Nevertheless, we recognize that if the practice of tethering were to become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers of such a development remains unclear.

2. The Effect of Section 1201 on the Operation of Section 117

The use of technological measures that prevent copying of a work could have a negative effect on users' ability to make archival copies that are permitted under section 117. If, and to the extent that, such anti-copying measures can also be considered to be access control measures that are protected against circumvention by section 1201,[265] section 1201 could be said to have an adverse impact on the operation of section 117 in this context. For several reasons, however, the actual impact on consumers appears to be minimal.

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[265] Section 1201 does not prohibit the circumvention of technological protection measures that only prevent copying. Thus, a user could lawfully circumvent the measures to create an archival copy. However, to the extent that copy controls also function as access controls, the circumvention of which is prohibited by section 1201, the circumvention of those measures is prohibited. Moreover, because section 1201 also prohibits the creation and distribution of circumvention tools, those consumers who lack the ability to circumvent technological protection measures would be unable to circumvent those measures even when such circumvention would not be unlawful.

First, since the overwhelming majority of computer programs sold in the United States are sold pursuant to a license, and section 117 applies only to "owners," the terms of the license agreement generally determine whether a user has the right to make an archival copy.[266] In cases where the license does not permit the creation of an archival copy, even absent technological protection measures, the copying is prohibited. Thus, in such cases it is the license that is impairing the operation of section 117.

Second, at the present time most software is sold without copy protection. Where the license permits or does not preclude the creation of an archival copy (or in the relatively few cases where the transaction was an outright sale) the user may make an archival copy as contemplated in section 117.

Third, as of last year approximately ninety-eight percent of computer software sold in the United States was sold on CD-ROM.[267] This means that even where consumers are prevented from making an archival copy, they are still able to reinstall the work in the event of computer malfunction. In essence, the CD-ROM itself acts as the archival copy. In that case, even if consumers are prevented from making archival copies as contemplated in section 117, their software investment is protected from system malfunctions, thus fulfilling the purpose of the archival exemption as articulated by CONTU.[268] Accordingly, we conclude that the evidence at this time of an effect of title I of the DMCA on the operation of section 117 is not substantial, and no legislative change is warranted.

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[266] Our (admittedly unscientific) review of sixteen license agreements for software used by the Copyright Office found that fourteen of them permitted the user to make a backup copy and one was silent. Only one of the sixteen licenses prohibited the user from making a backup copy, requiring the user either to use the original media as the backup copy or to replace the original media for a twenty-five dollar fee.

[267] R-SIIA, at 9.

B. THE EFFECT OF ELECTRONIC COMMERCE AND TECHNOLOGICAL CHANGE ON SECTIONS 109 AND 117

We have made no attempt in preparing this study to separate out the impact of electronic commerce on sections 109 and 117 from the impact of technological change. Such an effort would probably have been futile since, as the language of section 104 suggests, by grouping the two issues together, the issues are inextricably intertwined. In its essence, electronic commerce is commerce carried out through new technologies. This study is an outgrowth of the intersection between new technology and the new business models that it makes possible. Our evaluation is of the impact of that intersection on the specified provisions of the Copyright Act.

1. The First Sale Doctrine in the Digital World

a. *Application of Existing Law to Digital Content*

The application of section 109 to digital content is not a question of whether the provision applies to works in digital form — it does. Physical copies of works in a digital format, such as CDs or DVDs, are subject to section 109 in the same way as physical copies of works in analog form. Likewise, a lawfully made tangible copy of a digitally downloaded work, such as an image file downloaded directly to a floppy disk, is subject to section 109. The question we address here is whether the conduct of transmitting the work digitally,[269] so that another person receives a copy of the work, falls within the scope of the defense.[270]

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[268] *See supra*, at 29.

Section 109 limits a copyright owner's exclusive right of distribution. It does not, by its terms, serve as a defense to a claim of infringement of any of the other exclusive rights.[271] The transmissions that are the focus of proposals for a "digital first sale doctrine"[272] result in reproductions of the works involved. The ultimate product of one of these digital transmissions is a new copy in the possession of a new person. Unlike the traditional circumstances of a first sale transfer, the recipient obtains a new copy, not the same one with which the sender began. Indeed, absent human or technological intervention, the sender retains the source copy. This copying implicates the copyright owner's reproduction right as well as the distribution right.

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[269] The transmissions discussed in this section are not broadcasts, but transmissions that, like point-to-point transmissions, involve the selection of specific recipients by the sender.

[270] Some commenters were confused between the proposal to apply the first sale doctrine to otherwise unauthorized digital transmissions of copyrighted works by lawful owners of copies of such works and the notion that a lawful copy created as a result of an authorized digital transmission is a lawful copy for purposes of section 109. The former would expand the scope of section 109 and will be discussed below. The latter is well within the current language of the statute. Regardless of whether a copy is created as a result of the nearly instantaneous transmission of digital information through broadband computer connections or as a result of months of painstaking labor of a cloistered monk working with a quill by candlelight, so long as that copy is lawfully made, it satisfies the second prong of eligibility for the section 109 defenses.

[271] 17 U.S.C. § 109(a). In limited circumstances the public display right is covered as well. 17 U.S.C. § 109(c). *See supra*, note 53.

[272] The term "digital first sale doctrine" is used here to denote a proposed copyright exception that would permit the transmission of a work from one person to another, generally via the Internet, provided the sender's copy is destroyed or disabled (whether voluntarily or automatically by virtue of a technological measure). We use the term because it has been used frequently in discourse about the subject. It is, however, a misnomer since the proposal relates not to works in digital form generally (which are, of course, already subject to section 109), but to *transmissions* of such works.

Section 109 provides no defense to infringements of the reproduction right. Therefore, when the owner of a lawful copy of a copyrighted work digitally transmits that work in a way that exercises the reproduction right without authorization, section 109 does not provide a defense to infringement.

Some commenters suggested that this reading of section 109 is unduly formalistic. The language of the statute, however, must be given effect. Section 109 is quite specific about the rights that are covered, and does not support a reading that would find additional rights to be covered by implication. Where Congress intended to immunize an activity, such as fair use, from infringement of any of the exclusive rights, it did so expressly.[273] It simply cannot be presumed that where Congress did enumerate specific rights, it somehow intended other rights to be included as well. In addition, our reading of section 109 is entirely consistent with the judicial origin of the first sale doctrine in the *Bobbs-Merrill* decision. The Supreme Court drew a sharp distinction between the two rights, creating an exception to the vending (i.e., distribution) right only to the extent that it didn't interfere with the reproduction right.[274] We therefore conclude that section 109 does not apply to digital transmission of works.

b. *Evaluation of Arguments Concerning Expansion of Section 109*

A number of commenters proposed that section 109 be expanded to apply expressly to the reproduction, public performance and public display rights to the extent necessary to permit the digital transmission of a work by the owner of a lawful copy of that work, so long as that copy is destroyed. This section will review the arguments for and against such a digital first sale doctrine.

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[273] *E.g.*, 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.").

[274] *Bobbs-Merrill*, 210 U.S. at 350-51. *See* discussion *supra*, at 20-21.

i. Analogy to the physical world

Arguments in support of a digital first sale doctrine generally proceed from an analogy to the circulation of physical goods. Whether couched as a means of achieving technological neutrality,[275] meeting consumer expectations that were formed in the off-line world,[276] or eliminating barriers to competition between e-commerce and traditional commerce,[277] an underlying basis for the argument in favor of a digital first sale doctrine is that the transmission and deletion of a digital file is essentially the same as the transfer of a physical copy.

To be sure, there is an important similarity between physical transfer, on one hand, and transmission and deletion, on the other. At the completion of each process the transferor no longer has the copy (at least in usable form) and the transferee does. Some of the proposals would enhance this similarity by requiring the use of technological measures (in some cases referred to as "move" or "forward-and-delete" technology) that will disable access to or delete entirely the source file upon transfer of a copy of that file. Assuming the technology is effective, these proposals would ensure that the single act of sending the work to a recipient results in a copy of the work being retained by the recipient alone. They differ from the Boucher-Campbell bill, which required an additional affirmative act: the subsequent deletion of the work by the sender.

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[275] *E.g.*, C-Anthony, at 3.

[276] *E.g.*, R-DiMA, at 6 (arguing that, without a digital first sale doctrine, consumers are being short-changed when they purchase copyrighted works online because they don't get what they expect, and, consequently, will become disenchanted with the medium, decreasing legitimate demand and increasing online infringement).

The opponents of a digital first sale doctrine counter that the proposal would sharply reduce the supply of works available online because copyright owners would lack confidence that their works will be protected from piracy. In addition, they point out that there is tremendous demand for copyrighted works online, even though section 109 has not been expanded. R-SIIA, R-BMI. They view this as evidence that revision of section 109 is not a prerequisite to having robust growth in e-commerce in copyrighted works.

[277] C-HRRC, at 5-6.

Implicit in any argument by analogy is the assertion that the similarities outweigh the differences. Whether or not the analogy outlined above is compelling from a policy perspective depends upon whether the differences between the circulation of physical copies and electronic "transfers" are more significant than the similarities.

Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used"[278] copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world.[279]

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[278] The "used" copy refers to the copy on the recipient's computer. In fact, it is not "used" in any sense of the word since it was initially created on the recipient's computer as the end result of the transmission process.

Even the "lending" of a fairly small number of copies of a work by digital transmission could substitute for a large number of purchases. For example, one could devise an aggregation site on the Internet that stores (or, in a peer-to-peer model, points to) multiple copies of an electronic book. A user can "borrow" a copy of the book for as long as he is actually reading it. Once the book is "closed," it is "returned" into circulation. Unlike a typical lending library, where the book, once lent to a patron, is out of circulation for days or weeks at a time, the electronic book in this scenario is available to other readers at any moment that it is not actually being read. Since, at any given time, only a limited number of readers will actually be reading the book, a small number of copies can supply the demand of a much larger audience. The effect of this activity on the copyright owner's market for the work is far greater than the effect of the analogous activity in the non-digital world.

In addition, unless a "forward-and-delete" technology is employed, transfer of a copy by transmission requires an additional affirmative act by the sender. In applying a digital first sale doctrine as a defense to infringement it would be difficult to prove or disprove whether that act had taken place, thereby complicating enforcement.[280] This carries with it a greatly increased risk of infringement in a medium where piracy risks are already orders of magnitude greater than in the physical world. Removing, even in limited circumstances, the legal limitations on retransmission of works, coupled with the lack of inherent technological limitations on rapid duplication and dissemination, will make it too easy for unauthorized copies to be made and distributed, seriously harming the market for those works.[281]

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[279] T-SIIA, Kupferschmid, at 85.

[280] These differences have already been noted by the Register on a prior occasion. Marybeth Peters, *The Spring 1996 Horace S. Manges Lecture – The National Information Infrastructure: A Copyright Office Perspective*, 20 Colum. V.L.A. Journal 341, 355 (Spring, 1996).

Even the use of "forward-and-delete" technology, as advocated by some commenters,[282] is not a silver bullet. Technological measures can be hacked; they are expensive; and they often encounter resistence in the marketplace. In order to achieve a result that occurs automatically in the physical world, a publisher would have to pay for an expensive (and less than 100 percent reliable) technology and pass that cost along to the consumer, while at the same time potentially making the product less desirable in the marketplace. The ability of the market to correct this imbalance would be inhibited because copyright owners would need to apply these measures or face the risk of unauthorized copying under the guise of the first sale doctrine. In addition, technological measures may inadvertently impede legitimate uses of the work, harming consumers. Further, no one has offered evidence that this technology is viable at this time.

One copyright industry representative observed in oral testimony that there had been no "hue and cry, not even so much as a suggestion, that consumers are looking for products that will function under the forward-and-delete model."[283] To the contrary, the Napster phenomenon was cited as evidence that consumers wish to retain, not destroy, the digital copy from which the work is transmitted.[284] We encountered nothing in the course of preparing this Report that would refute this observation.

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[281] *Accord* R-Time Warner Inc., at 2-3.

[282] *E.g.*, R-DiMA, at 5.

Each of these differences between circulation of tangible and intangible copies is directly relevant to the balance between copyright owners and users in section 109. In weighing the detrimental effect of a digital first sale doctrine on copyright owners' markets against the furtherance of the policies behind the first sale doctrine it must be acknowledged that the detrimental effect increases significantly in the online environment. "The ultimate question is whether an equivalent to the first sale doctrine *should* be crafted to apply in the digital environment. The answer must turn on a determination that such a new exception is needed to further the policies behind the first sale doctrine, and that it can be implemented without greater detriment to the copyright owner's market."[285] We turn now to an evaluation of the policies behind the first sale doctrine.

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[283] T-NMPA, Mann, at 157.

[284] *Id.* at 157-58.

[285] Peters, *supra*, note 280, at 355-56 (emphasis in original).

ii. Policies behind the first sale doctrine

"The first sale doctrine was originally adopted by the courts to give effect to the early common law rule against restraints on the alienation of tangible property."[286] As discussed above, it appears to have been motivated as well by competition concerns – specifically, the ability of publishers to use their vending or distribution right to control not only the initial sales of books, but the aftermarket for resales.[287]

The tangible nature of the copy is not a mere relic of a bygone technology. It is a defining element of the first sale doctrine and critical to its rationale. This is because the first sale doctrine is an outgrowth of the distinction between ownership of intangible intellectual property (the copyright) and ownership of tangible personal property (the copy).[288]

The distribution right can be conceptualized as an extension of the copyright owner's exclusive rights to include an interest in the tangible copies. Under common-law principles, the owner of the physical artifact – the copy – has complete dominion over it, and may dispose of possession or ownership of it as he sees fit. The distribution right, nonetheless, enables the copyright owner to prevent alienation of the copy – up to a point. That point is when ownership of a lawfully made copy is transferred to another person – *i.e.*, first sale. The first sale doctrine upholds the distinction between ownership of the copyright and ownership of the material object by confining the effect of the distribution right's encroachment on that distinction.

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[286] S. Rep. No. 162, 98th Cong., 1st Sess. 4 (1983). The legislative history of section 109 and of section 27 of the 1909 law, the first codification of the first sale doctrine, is quite brief. Despite its brevity, it focuses on one important and relevant concept. Repeatedly, the congressional reports refer to the ability of the owner of a *material copy* to dispose of that copy as he sees fit. H.R. Rep. No. 2222, 60th Cong., 2nd Sess. 19 (1909); H.R. 28192, 60th Cong., 2nd Sess. 26 (1909); H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 79 (1976).

[287] *See supra*, at 21.

[288] "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." 17 U.S.C. § 202.

The underlying connection between the two concepts is apparent in the 1909 Copyright Act. Both the first sale doctrine and the doctrine that ownership of copyright is distinct from ownership of a material object are found in section 27.[289] Notwithstanding their codification in separate sections of the 1976 Act, their origin as part of the same provision of the 1909 Act demonstrates that the concepts are two sides of the same coin.

Digital transmission of a work does not implicate the alienability of a physical artifact. When a work is transmitted, the sender is not exercising common-law dominion over an item of personal property; he is exercising the central copyright right of reproduction with respect to the intangible work. Conversely, the copyright owner's reproduction right does not interfere at all with the ability of the owner of the physical copy to dispose of ownership or possession of that copy, since the first sale doctrine applies fully with respect to the tangible object (e.g., the user's hard drive) in which the work is embodied.

Because the underlying purpose of the first sale doctrine is to ensure the free circulation of tangible copies, it simply cannot be said that a transformation of section 109 to cover digital transmissions furthers that purpose. The concerns that animate the first sale doctrine do not apply to the transmission of works in digital form.[290]

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[289] The text of section 27 is quoted, *supra*, note 39.

A number of the comments we received express the view that a digital first sale doctrine would further the purposes of section 109. We note that none of those comments are supported by a historically sound formulation of what those purposes are. For example, one commenter argued that the first sale doctrine is based on a calculation of incentives to create.[291] This view is not supported by the legislative history of section 109. Moreover, as is discussed below, the potential harm to the market and increased risk of infringement that would result from an expansion of section 109 could substantially reduce the incentive to create.[292] Thus, this argument is both historically unsound and unpersuasive as a practical matter.

Another commenter suggested that the original purpose of the first sale doctrine was "to Promote the Progress of science and Useful Arts [sic]."[293] This observation does not advance the argument. It is a given that the "Progress of Science and useful Arts"[294] is the policy undergirding the *entire* Copyright Act. However, particular provisions of the law may have more precise purposes, as is the case here.

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[290] "The first sale doctrine was developed to avoid restraints on the alienation of physical property, and to prevent publishers from controlling not only initial sales of books, but the after-market for resales. These concerns do not apply to transmissions of works on the [Internet]." Peters, *supra*, note 280, at 355-56 (emphasis in original).

[291] C-DiMA, at 5-6 ("Copyright law secures to the copyright owner the exclusive rights of first distribution to provide an incentive for the creation and dissemination of copyrighted works. Once the copyright holder has been compensated for the initial distribution of the work, no further incentive is required, so the copyright owner should not be able to extract further profits from that particular copy of the work.").

[292] *See infra*, at 97-99.

[293] C-DFC, at 2 ("Historically, the 'first sale' doctrine has contributed to the achievement of that goal by providing a means for the broad secondary dissemination of works of imagination and information.") (quoting without citation, U.S. Const. Art. I, sec. 8).

[294] U.S. Const. Art. I, sec. 8.

The library associations made the claim that the first sale doctrine is based on a right of access[295] – a right not found in the legislative history of section 109. In support of this argument, they cited to section 109(d)[296] as a demonstration that section 109 applies "according to the scope of the interest that has been transferred, rather than according to the object of that interest."[297] We understand this argument to suggest that because the lease of a tangible object is not activity to which section 109 applies, the fact that a work is embodied in a tangible object must not be the test for the application of section 109. Instead, this argument appears to suggest, the scope of the interest conveyed (ownership versus rental) is the determinative factor for the application of section 109. This interpretation is fundamentally flawed. Section 109 is conditioned on *both* ownership (as opposed to mere possession) and the requirement that such ownership be of a particular physical copy. The failure to satisfy either requirement will preclude the distribution of the copy pursuant to section 109.

The library associations supported their conclusion regarding the first sale doctrine being a proxy for a right of access by proceeding from the premise that the requirement of a particular physical copy should be jettisoned from the doctrine. To support that premise, the library associations claim that the requirement of a particular physical copy "was an efficient proxy for distinguishing the copyright owner's exclusive rights in his work from the right to access and use that work . . . ."[298] The argument is circular.

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[295] R-Library Ass'ns, at 3-7.

[296] 17 U.S.C. § 109(d) (stipulating that the privileges of this section apply only to ownership of copies, not mere possession).

[297] *Id.* at 3.

There is nothing to support the thesis that the first sale doctrine is a stand-in for a right of access to copyrighted works. Apart from the reference to section 109(d) discussed above, no authority was marshaled in support of this proposition. Neither the statutory text nor the legislative history of section 109 (or section 27 of the 1909 law) support the proposition. To the contrary, however, the Supreme Court's decision in *Bobbs-Merrill* and the legislative history of the 1909 Act do refer directly to alienability of tangible property.[299]

A number of the comments also made reference to socially desirable activities, such as library lending, that are furthered by the existing first sale doctrine, and argue that similarly desirable activities would be furthered by a digital first sale doctrine. Asserting that a digital first sale doctrine would have beneficial effects is not the same as arguing that it would further the purposes of the existing first sale doctrine, since there is no sound basis for asserting that those effects are related to the purpose of the first sale doctrine. This argument relates not to underlying purpose, but to a balancing of the impact of copyright rights and exceptions. Even assuming the accuracy of the assertion that a digital first sale doctrine would result in socially desirable activities, the fact that a particular limitation on a copyright owner's exclusive rights will promote a public good is not, in itself, a sufficient basis for curtailing copyright protection. The social benefit must be balanced against the harm to the copyright owner's legitimate interests, and thus to the incentive to create. As discussed above, the extension, by analogy, of the first sale doctrine to the online environment has a significantly greater negative impact on copyright owners' legitimate interests than does the traditional first sale doctrine in the realm of tangible copies.

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[298] *Id.* at 3-4.

[299] *See supra* at 20-24.

iii. Development of new business models

Reasoning by analogy always carries with it the risk of becoming captive to the analogy. Assumptions that are implicit in one situation can carry over to the analogous situation even though those assumptions no longer apply. This appears to be the case with the analogy between distribution of tangible copies and online transmissions of works.

Proposals for a digital first sale doctrine endeavor to fit the exploitation of works online within a distribution model that was developed within the confines of pre-digital technology. Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers.[300] Requiring that transmissions of digital files be treated just the same as the sale of tangible copies artificially forces authors and publishers into a distribution model based on outright sale of copies of the work. The sale model was dictated by the technological necessity of manufacturing and parting company with physical copies in order to exploit a work –

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[300] Jane C. Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law* 10 (2000) (available online at papers.ssrn.com/paper.taf?abstract_id=222493).

neither of which apply to online distribution. If the sale model continues to be the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.

iv. International considerations

In evaluating the arguments put forward to support a digital first sale doctrine, it is instructive to inquire how the international community is addressing the application of exhaustion of rights[301] to the online transmissions of works. The 1996 WIPO treaties[302] set international norms for the treatment of copyright and related rights in the Internet environment. The treaties addressed both the circulation of physical goods and the transmission of works.

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[301] "Exhaustion" is the term that is often used in international agreements to refer to the termination of a copyright owner's distribution right with respect to a particular copy after that copy has been sold with the copyright owner's authorization — i.e., the first sale doctrine. The distribution right is said to "exhaust" after the first sale.

[302] *See supra*, at 5.

The WCT and the WPPT provide an exclusive distribution right[303] with respect to tangible copies of works while, with respect to intangible copies (that is, transmissions), providing a separate exclusive right of making available to the public, that was conceived as a subset of a general right of communication to the public.[304] The treaties permit members to limit the distribution right with an exhaustion principle,[305] but there is no requirement to do so. There is no provision in either treaty regarding exhaustion of the making available or communication rights. This is hardly surprising since exhaustion is a concept that has heretofore only applied to the right to distribute tangible copies.

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[303] WCT, art. 6:
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through the sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the owner.*

*Agreed statement concerning Articles 6 and 7: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

WPPT, art. 8:
(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through the sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.*

*Agreed statement concerning Articles 2(e), 8, 9, 12, and 13: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.;

WPPT, art. 12:
(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through the sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.*

*Agreed statement concerning Articles 2(e), 8, 9, 12, and 13: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Those countries that have implemented protection for online transmissions have largely done so through the right of communication to the public and thus provide no equivalent of the first sale limitation to such rights. We are not aware of any country other than the United States that has implemented the making available right through application of a combination of the distribution, reproduction, public performance and public display rights. In a sense, the only reason the issue of first sale arises in the U.S. is because we chose to implement the making available right through, *inter alia*, the distribution right. Elsewhere, online transmissions are considered communications to the public, and the first sale doctrine simply does not apply.

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[304] WCT, art. 8:
Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

WPPT, art. 10:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.;

WPPT, art. 14:

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[305] WCT, art. 6(2); WPPT, art. 8(2), art. 12(2).

An important example of this is the European Union's Information Society Directive.[306] This directive, which, among other things, implements the WIPO treaties, provides for a distribution right[307] that is limited by the exhaustion principle, and a separate making available right that is not. The exhaustion principle in the Directive is expressly limited to circulation of tangible copies:

> Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community.[308]

The Directive goes further, stating in clear terms that exhaustion does not apply to online transmissions:

> The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-

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[306] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167/10 2001) ("Information Society Directive").

[307] Information Society Directive, art. 4:

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

[308] Information Society Directive, art. 28.

> ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.[309]

The decision of the EU not to create an exception to the right of communication to the public that is similar to the doctrine of exhaustion of the right of distribution represents an informed policy decision that such an expansion is not appropriate. We are not aware of a public outcry in any of the EU countries in opposition to this decision.

The analogy that some in the U.S. have made between the downstream distribution of a tangible copy of a work and an online transmission is attractive because of the broad application of the right of distribution in U.S. copyright law. As both activities implicate the distribution right, the distinction between the distribution of physical objects and intangible transmissions may at first blush seem small. They are, however, distinct acts with distinct characteristics that ought not necessarily be treated similarly. When viewed through an international lens this distinction becomes clearer.

c. *Recommendations*

Based on the foregoing discussion, and for the reasons set forth below, we recommend no change to section 109 at this time. Although there is a great deal of speculation about what may happen in the future, we heard no convincing evidence of present-day problems. However, legitimate concerns have been raised about what may develop as the market and technology evolve. These concerns are particularly acute in the context of the potential impact on library operations. The time may come when Congress may wish to consider further how to address these concerns.

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[309] Information Society Directive, art. 29.

i. No change to section 109

In order to recommend a change in the law, there should be a demonstrated need for the change that outweighs any negative aspects of the proposal. We do not believe that this is the case with the proposal to expand the scope of section 109 to include a digital first sale doctrine.

Much of the rhetorical force behind the digital first sale proposal stems from the analogy to circulation of goods in the physical realm. On examining the nature of digital transmissions compared to the nature of transfers of material objects, we do not find this analogy compelling for several reasons.

The analogy ultimately rests on the fiction that a transmission of a work is the same as a transfer of a physical copy. In order to get around the fact that a transmission results in two copies, the analogy requires one of two things to happen: either a voluntary deletion of the sender's copy or its automatic deletion by technological means. Both are unworkable at this time.

Relying on voluntary deletion is an open invitation to virtually undetectable cheating, and there is no reason to believe there would be general compliance with such a requirement. If the burden were placed on the copyright owner to demonstrate that there was no simultaneous deletion of the copy from which the transmission was made, it would erect what would probably be an impossible evidentiary burden. If the burden of establishing the defense were placed on the defendant, and had to be met by demonstrating simultaneous deletion, the defendant would have a similarly impossible evidentiary burden. If the defendant were merely required to demonstrate the absence of a copy of the work on his hard drive, then the simultaneous deletion principle would, as a practical matter, disappear, and section 109 would become a defense that could be asserted whenever a copy was deleted at any time after it had been transmitted one or more times or copied for retention on another medium. The recent phenomenon of the popularity of using Napster to obtain unauthorized copies of works strongly suggests that some members of the public will infringe copyright when the likelihood of detection and punishment is low.

Relying on a "forward-and-delete" technology is not workable either. At present such technology does not appear to be available. Even assuming that it is developed in the future, the technology would have to be robust, persistent, and fairly easy to use. As such, it would likely be expensive – an expense that would have to be borne by the copyright owner or passed on to the consumer. Even so, the technology would probably not be 100 percent effective. Conditioning a curtailment of the copyright owners' rights on the employment of an expensive technology would give the copyright owner every incentive *not* to use it. In the alternative, it would be damaging to the market to expand section 109 in anticipation of the application of technological protection measures, thus giving the copyright owner a choice between significantly increased expenses, significantly increased exposure to online infringement, or not offering works online.

Asserting, by analogy, that an online digital transmission is the same as a transfer of a material object ignores the many differences between the two events. Digital transmission has a much greater effect on the market for copies provided by the copyright owners. It is also accompanied by a greatly increased risk of piracy.

The risk that expansion of section 109 will lead to increased digital infringement weighs heavily against such an expansion. Copyright piracy in the online world is not a matter of speculation — it is, unfortunately, an established fact of life. It appears likely that expanding section 109 would encourage infringement of the reproduction right, either in the mistaken belief that the provision allows a user to retain a copy of a work after it has been transmitted one or more times, or in the belief that the defense can be asserted in bad faith to defeat, or at least complicate, an infringement lawsuit. And unlike Napster, the activity would not rely on a central server, so both the infringing activity and the evidence of infringement would be decentralized and therefore difficult to detect and remedy.[310]

Twice since the enactment of the current Copyright Act, Congress has stepped in to *narrow* the scope of the first sale doctrine to safeguard the reproduction right.[311] In both cases there was anecdotal evidence of abuses in the marketplace, combined with conditions that created the opportunity for widespread abuse. The same conditions apply to the proposals to create a digital first sale doctrine. Again, the striking popularity of Napster is a strong indication that many people will infringe copyright if the means to do so is at their disposal. And the more convenient the means, the greater the likelihood of infringements. The risk to the copyright owners' reproduction right is simply too great.

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[310] *See* I. Trotter Hardy, Project Looking Forward: Sketching the Future of Copyright in a Networked World 262-63 (Copyright Office, 1998) (analyzing the difficulties involved in preventing, identifying, and remedying decentralized infringement) (available online at www.loc.gov/copyright/docs/thardy.pdf).

[311] *See* discussion *supra*, at 24-25.

We do not ignore the claim that an expansion of section 109 would further the pro-competitive goals of the first sale doctrine. To the extent that section 109 does not permit the transmission of copyrighted works, the right holders retain the exclusive right to restrict or prohibit such activity, thereby barring resales that compete with sales of new copies. Of course, a lawfully made and owned copy of a work on a floppy disk, Zip™ disk, CD-ROM or similar removable storage medium can easily be transferred by physical transfer of the item and that activity is within the current reach of section 109. In the final analysis, the concerns about expanding first sale to limit the reproduction right, harm to the market as a result of the ease of distribution, and the lessened deterrent effect of the law that could promote piracy, outweigh the pro-competitive gains that might be realized from the creation of a digital first sale doctrine. In addition, there does not appear to be any evidence that the kind of price-fixing behavior that prompted the Supreme Court to establish the first sale doctrine is occurring. Should such behavior become widespread, and should antitrust law fail to afford an appropriate remedy, this conclusion may have to be revisited.

Implicit in several of the submissions that addressed the first sale issue is a belief that the analogy of transmissions to physical transfer is so compelling that consumer expectations about transferability of downloaded material have become deeply-rooted. It is said that failure of the law to live up to this expectation will damage commerce in such material. We are aware of no empirical (or even anecdotal) evidence for this proposition, so any assessment of claims concerning consumer expectations and their effect on e-commerce is necessarily conjectural. However, it can be said with confidence that e-commerce and the market for works online has grown quite substantially despite the absence of an expanded section 109. In addition, judging from consumer trends today, there appears to be little or no evidence of desire on the part of consumers to engage in the kind of conduct — transmission and simultaneous deletion — that would be covered in a digital first sale doctrine.

In any event, these issues of consumer expectations and the growth of electronic commerce are precisely what should be left to the marketplace to determine. Straight-jacketing copyright owners into a distribution model that developed around a different technology at a different time is a formula for stifling innovative, market-driven approaches to meeting consumer demand for digital content. If, as has been asserted, the current terms by which copyright owners offer their products are unacceptable to consumers, consumers will stop buying them under those terms and competitors will step into the breach. Such self-correcting market forces should be given an opportunity to address these types of concerns before Congress alters the balance of rights and exceptions in the Copyright Act.

ii. Further consideration of ways to address library issues related to the first sale doctrine

The fact that we did not recommend adopting a "digital first sale" provision at this time does not mean that the issues raised by libraries are not potentially valid concerns. Similarly, our conclusion that certain issues are beyond the scope of the present study does not reflect our judgment on the merits of those issues.

The library community has raised concerns about how the current marketing of works in digital form affects libraries with regard to five specifically enumerated categories: interlibrary loans, off-site accessibility, archiving/preservation, availability of works, and use of donated copies.[312] In each case, the concern is that licensing terms for use of the works will effectively prohibit the desired activity.[313]

Concerning interlibrary lending, library associations suggest that the Copyright Act should reaffirm and strengthen rules on interlibrary loan especially for acquired digital works.[314] They state that licenses often prohibit the loaning of works in digital form. As mentioned elsewhere, the issue of licenses is beyond the scope of this study.

It should be noted that many interlibrary loans are not in fact loans – the temporary lending of a particular copy of a work – but delivery of copies. The "lending" institution reproduces the copyrighted work and sends the reproduction to the "borrowing" library. This copy is given by the borrowing library to its patron, who becomes the owner of that copy. Clearly this activity of libraries is outside of the scope of section 109. As to the library patron, to the extent that such a reproduction and distribution is authorized by section 108,[315] the copy becomes his property and is therefore subject to section 109.

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[312] C-Library Ass'ns, at 11-19.

[313] *Id.*

[314] *Id.* at 11-13, 23.

Library concerns about offsite accessibility relate chiefly to licenses that limit access to a particular work to a specific location (e.g., a single building or computer). This means that such works are not available for use offsite, including in a classroom. Libraries seek the ability to make all works in their collections available for classroom use.[316] These are contract issues that are not within the mandate for this study.

Library associations raised a related concern about licensing terms which limit the number of users of a work at any given time, the hours of the day during which works may be used, or other similar limitations.[317] Less restrictive licenses are often available, but at a higher price. As with restrictions on offsite availability of works, these limitations have the effect of reducing the general availability of those works that are subject to the limitations. The library associations believe that these restrictions create substantial burdens to research.[318] This is also a contract issue that is not within the mandate of the study. However, we do note that the difficulty identified by the library associations is not new, and is not unique to the digital world. Libraries have always had make difficult trade-offs between greater availability of particular works (through the purchase of more copies) and other priorities.

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[315] Section 108 was updated in the Digital Millennium Copyright Act of 1998; as updated, section 108 makes it clear that digital copies may not be given to patrons. Copies given to patrons must be in analog form – e.g., photocopies.

[316] C-Library Ass'ns, at 11-13, 23.

[317] *Id.* at 17.

[318] *Id.*

Concern was also raised about works that libraries can only offer by means of online access. The terms of use of a work that is accessed in this way are typically set forth in a subscription agreement. Online access is achieved by loading the work into the RAM of a computer while it is being accessed; it does not involve the making of a permanent copy. Here there is no section 109 issue – at the end of the online session the library owns no physical copy that can be transferred.

Preservation and archiving are identified as potential problems because many licenses prohibit copying for such purposes (or for any purpose) and because prohibitions on copying are enforced by technological means.[319] The library associations propose creating a national system of digital repositories, where specific libraries or institutions would be designated as custodians of specific parts of our nation's digital history and assisted in their efforts to preserve these works.[320] While these issues are beyond the scope of this study, we acknowledge that they are legitimate concerns that have been recognized as such.[321] In fact, they are being addressed. For example, the Librarian of Congress, James H. Billington, has appointed a national advisory committee to assist the Library of Congress in the development of a National Digital Information Infrastructure and Preservation Program to ensure the long-term availability of digital materials. That committee held its first meeting on May 1, 2001.

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[319] C-Library Ass'ns, at 14.

[320] *Id.* at 23.

[321] Committee on Intellectual Property Rights and the Emerging Information Infrastructure, The Digital Dilemma 209-10 (2000).

The focus of library concerns regarding donated copies is their ability to use donated CD-ROMs. Libraries are not able to use CD-ROMs donated to them because the donors are not owners of the CD-ROMs, only licensees, and thus lack the legal authority to transfer the copy of the work they possess.[322] Since the license agreement prevents the transfer, the issue is beyond the scope of this study.

Most of these issues arise from terms and conditions of use, and costs of license agreements. One arises because, when the library has only online access to the work, it lacks a physical copy of the copyrighted work that can be transferred.[323] These issues arise from existing business models and are therefore subject to market forces. We are in the early stages of electronic commerce. We hope and expect that the marketplace will respond to the various concerns of customers in the library community. However, these issues may require further consideration at some point in the future. Libraries serve a vital function in society, and we will continue to work with the library and publishing communities on ways to ensure the continuation of library functions that are critical to our national interest.

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[322] C-Library Ass'ns, at 18-19.

[323] *See* Ginsburg *supra* note 300, at 10.

2. The Legal Status of Temporary Copies

a. *Relevance to this Report*

As was discussed above, this Report is a direct outgrowth of Congressional concern at the time of the enactment of the DMCA about the copyright treatment of digital reproduction and transmission.[324] Specifically, the scope of the study and Report mandated by Congress in section 104 of the DMCA can be traced to some of the proposed amendments to sections 109 and 117 of title17 made in the Boucher-Campbell bill.[325] One of these proposals was an amendment to section 117 that would allow temporary copies to be made if these copies were "incidental to the operation of a device in the course of the use of a work otherwise lawful under this title."[326] While this proposal was not adopted by Congress, section 117 was one of the provisions of title 17 that we were instructed to examine in this Report. The only context in which section 117 arose in the Boucher-Campbell bill was with respect to incidental copying.

This Report necessarily requires consideration and evaluation of temporary incidental copies made in the course of use on a computer or computer network, such as the Internet. In addition to the congressional concerns leading to the creation of this Report, the comments and testimony received in the course of our study illustrate the importance of clarifying the lawful scope of temporary copies in the current market. In order to understand the issues raised by the transmission of digital works over the Internet, it is appropriate to clarify the current state of the law on this issue. This section will discuss the origins of the section 117 exemption for temporary copies and examine its purpose in relation to new developments related to temporary buffer copies.

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[324] *See* discussion *supra*, at 18.

[325] H.R. 3048, 105th Congress, 1st Session, November 13, 1997. *See* discussion *supra*, at 15 & ff.

[326] *Id.* at Sec. 6(b)(1).

b. *RAM Reproductions as "Copies" under the Copyright Act*

i. Technical background

All instructions and data that are operated on by a computer are stored in integrated circuits known as RAM. Unlike flash memory, read-only memory (ROM)[327] and magnetic storage devices such as disk and tape drives, RAM is volatile: when power is switched off, all information stored in RAM is erased. Conversely, as long as the power remains on, information stored in RAM can be retrieved and reproduced unless it is overwritten by other information.

All of the familiar activities that one performs on a computer — e.g., execution of a computer program, retrieval and display of information, browsing the World-Wide Web — necessarily entail making reproductions in RAM. These reproductions generally are made automatically, and transparently to the user—i.e., without the user being aware that copies are being made. The copies usually persist for as long as the activity takes place.[328] For example, the instructions that comprise a computer program generally remain in RAM for as long as the program is running. Likewise, the data that express text and images remain in RAM for as long as the text and images are displayed. As the packets of binary information comprising works traverse computer networks, temporary copies (in RAM and on disk) are made as they move from point to point along the way from source to destination.

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[327] This term includes all variants of ROM, such as programmable read-only memory (PROM), erasable programmable read-only memory (EPROM), electrically erasable programmable read-only memory (EEPROM) and so on.

[328] In many instances, as a technical matter, the information will remain in RAM even after it is no longer in use. For example, when a computer program terminates, the operating system takes note of the fact that the memory occupied by the program is now available for other use. The content of that memory, however, is unchanged until it is overwritten with new information, or the power is turned off.

Although it is theoretically possible that information could be stored in RAM for such a short period of time that it could not be retrieved, displayed, copied or communicated, this is unlikely to happen in practice. A device that is capable of storing, but not retrieving, displaying, copying or communicating information would have no practical purpose, and there would be no engineering justification for making such a device.

The issue of the legal status of RAM reproductions has arisen in this study almost exclusively in the particular factual context of streaming audio.[329] In order to render[330] the packets of audio information in an audio "stream " smoothly, the rendering software maintains a "buffer" – a portion of memory set aside to store audio information until it has been rendered. Inconsistencies in the rate at which audio packets are delivered over the Internet are thus evened out, so that the software can render the information at a constant rate. As information is rendered, it is discarded and new information is put into the buffer as it is received.

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[329] "Streaming audio" is the digital transmission of sound – often sound recordings of musical compositions – as a series of packets of audio information that are reassembled and rendered on the recipient's computer as they are received.

[330] In this context "render" means the process by which the digital representation of sounds and/or images is converted back into those sounds and/or images.

ii. Statutory analysis

Section 106(1) of the Copyright Act grants a copyright owner the exclusive right "to reproduce the copyrighted work in copies" and to authorize others to do so. Reproducing a work in RAM therefore falls within the scope of a copyright owner's exclusive reproduction right if it results in a "copy."

The starting point for determining whether reproductions in RAM are copies for copyright purposes is the text of the statute. "Copies" are defined in the Copyright Act as:

> material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[331]

There is no question that RAM chips are "material objects." They are electronic integrated circuits, etched and deposited on a wafer of semiconducting material (such as silicon), which are capable of storing binary information in the form of electrical impulses. A work stored in RAM can be "perceived, reproduced, or otherwise communicated" with the aid of a computer. The key issue, therefore, is whether a reproduction in RAM is "fixed."

The Copyright Act defines "fixed" as follows:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.[332]

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[331] 17 U.S.C. § 101.

[332] *Id.*

As to the element of duration, the definition of "fixed" does not require that a copy be permanent or that it last for any specified period of time.[333] For a work to be fixed, is must only be "*sufficiently* permanent *or stable* to permit it to be perceived [or] reproduced . . . for a period of more than transitory duration."[334] Although the embodiment of a work in RAM is not permanent, since loss of power results in erasure of the work, typically it is "sufficiently . . . stable" to be "perceived [or] reproduced" for an indefinite period of time — i.e., for as long as the power remains on and the memory locations storing the work are not overwritten with other information. As one court has observed, the conclusion that RAM copies are fixed

> is actually confirmed rather than refuted by [the] argument that the RAM representation of the program is not "fixed" because it disappears from RAM the instant the computer is turned off. Thus one need only imagine a scenario where the computer, with the program loaded into RAM, is left on for extended periods of time, say months or years, or indeed left on for the life of the computer. In this event, the RAM version of the program is surely not ephemeral or transient; it is, instead, essentially permanent and thus plainly sufficiently fixed to constitute a copy under the Act.[335]

Based on the definitional language in the Copyright Act, RAM reproductions are generally "fixed" and thus constitute "copies" that are within the scope of the copyright owner's reproduction right. The definition of "fixed" leaves open the possibility, however, that certain RAM reproductions that exist for only a "period of . . . transitory duration" are not copies. The statute does not define "transitory duration" directly. Since permanence is not required for fixation, "transitory" must denote something shorter than "temporary." "Transitory" must also denote something less than "ephemeral," as that term is used in the Copyright Act, since the Act confirms that "ephemeral recordings" are fixed by providing a specific exemption for "ephemeral recordings" lasting up to six months.[336] Courts have not attempted to formulate a general rule defining how long a reproduction must endure to be "fixed," deciding instead on a case-by-case basis whether the particular reproduction at issue sufficed.[337]

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[333] *See Advanced Computer Services of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 362-63 (E.D. Va. 1994).

[334] 17 U.S.C. § 101 (emphasis added).

[335] *Advanced Computer Services*, 845 F. Supp. at 363.

Nonetheless, a general rule can be drawn from the language of the statute. In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived. The economic value derived from a reproduction lies in the ability to copy, perceive or communicate it. Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights. The dividing line, then, can be drawn between reproductions that exist for a sufficient period of time to be capable of being "perceived, reproduced, or otherwise communicated" and those that do not.[338]

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[336] 17 U.S.C. § 112.

[337] *See, e.g.*, *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Advanced Computer Servs.*, 845 F. Supp. at 363.

[338] This view is consistent with the discussion of fixation in the legislative history of the Copyright Act. The legislative history is examined *infra* at 114-117.

It is also consistent with "a quite well-established position at the international level" that "fixation means sufficient stability of form so that what is 'fixed' may be perceived, reproduced or otherwise communicated." Mihály Ficsor, *Copyright for the Digital Era: The WIPO "Internet" Treaties*, 21 Colum./VLA J. L. and the Arts 197 (1997) ("Digital Era").

As a practical matter, as discussed above, this would cover the temporary copies that are made in RAM in the course of using works on computers and computer networks.

Drawing the line with reference to the ability to perceive, reproduce or otherwise communicate a work makes particular sense when one considers the manner in which one important category of digital works—computer programs—are utilized. Computer programs are exploited chiefly through exercise of the rights of reproduction and distribution. In order to utilize a program, it must be copied into RAM. To exercise the right to make that temporary copy in RAM is to realize the economic value of the program. That RAM copy need only exist long enough to communicate the instructions to the computer's processing unit in the proper sequence.

Exploitation of works on digital networks illustrates the same point. Digital networks permit a single disk copy of a work to meet the demands of many users by creating multiple RAM copies. These copies need exist only long enough to be perceived (e.g., displayed on the screen or played through speakers), reproduced or otherwise communicated (e.g., to a computer's processing unit) in order for their economic value to be realized. If the network is sufficiently reliable, users have no need to retain copies of the material. Commercial exploitation in a network environment can be said to be based on selling a right to perceive temporary reproductions of works.[339]

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[339] Other exclusive rights may be involved as well. A discussion of these additional rights is beyond the scope of this Report.

Apart from these policy considerations, attempting to draw a line based on duration may be impossible. The language of the Copyright Act rules out drawing the line between temporary and permanent copies, as discussed above. Even if this distinction were possible under the statute, the concept of permanence is not helpful in this context. Magnetic disks and tapes can be erased; printed works decompose over time, or can be destroyed deliberately or accidentally. Separating some temporary copies from others based on their duration poses similar difficulties. How temporary is temporary? Hours? Minutes? Seconds? Nanoseconds? The line would be difficult to draw, both in theory and as a matter of proof in litigation.

The conclusion that reproductions in RAM are "copies" is reinforced by the existence of another provision of the Copyright Act: section 117. The current version of section 117 was added in 1980 at the recommendation of CONTU. In relevant part, it provides:

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner . . . .[340]

The "new copy" that is "created as an essential step in the utilization of the computer program in conjunction with a machine" is the copy made in RAM when the program is executed. No such exemption would have been necessary if reproductions in RAM could not be copies. It would be unreasonable to interpret the definitions in section 101 in such a way that it would render section 117 superfluous.[341]

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[340] 17 U.S.C. § 117.

iii. Legislative history

The legislative history of the Copyright Act confirms that certain temporary reproductions implicate the reproduction right, but is ambiguous as to the precise dividing line between temporary reproductions that are considered "fixed" and those that are not. In discussing the definition of "fixed," the House Report that accompanied the Copyright Act of 1976 states that copies that exist only "momentarily" in RAM may not satisfy the fixation requirement.[342] According to the 1976 House Report, "the definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer."[343]

One interpretation of that statement is that Congress viewed all reproductions in the "memory" of a computer to exist only momentarily, and thus as incapable of meeting the fixation requirement.[344] If so, then the legislative history was based on an imperfect grasp of the relevant technology. As discussed above, reproductions in RAM can exist for long periods of time — i.e., for as long as the power remains on and no other information is stored in the memory locations occupied by the reproduction. In addition, RAM reproductions are qualitatively different from the other examples cited (projection on a screen, or display on a television or cathode ray tube). RAM reproductions are stored or embodied in the RAM chip. A projection on a screen or a display on a television or cathode ray tube is not stored or embodied in the screen or TV or display tube.[345] In any event, the premise that all RAM reproductions exist only momentarily is incorrect, and cannot support a conclusion that all RAM reproductions are unfixed.[346]

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[341] *See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

[342] 1976 House Report, *supra* note 40, at 53.

[343] *Id.*

[344] *See* discussion *infra*, at 120-123.

Another possible interpretation of the statement in the House Report concerning computer memory is that it applies not to all RAM reproductions, but only to those "reproductions . . . captured *momentarily*" in "computer memory."[347] This interpretation implies that any reproduction in computer memory that exists more than "momentarily" is fixed. This interpretation adheres more closely to the statutory text, since, as discussed above, the statute on its face contemplates that at least some temporary copies satisfy the fixation requirement.[348] Consequently, it appears to be the better interpretation of the language in the 1976 House Report.

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[345] *See infra*, note 369.

[346] *Accord* CONTU Report, *supra* note 61, at 22 n.111 ("Insofar as a contrary conclusion [that works in computer storage are not fixed] is suggested in one report accompanying the new law, this should be regarded as incorrect and should not be followed since legislative history need not be perused in the construction of an unambiguous statute.").

[347] 1976 House Report, *supra* note 22, at 53 (emphasis added).

[348] *See* discussion *supra*, at 109–114.

Stating that copies which exist only "momentarily" are not fixed (and copies that exist longer are fixed) still begs the question of precisely which RAM copies exist for too short a time to satisfy the fixation requirement, and which do not. The best guide in the legislative history for determining where Congress intended to draw the line between fixed and unfixed reproductions is elsewhere in the 1976 House Report, where it is stated that "fixation is sufficient if the work 'can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'"[349] This statement supports the distinction drawn above between RAM copies that exist long enough to be perceived, reproduced or otherwise communicated and those that do not.

The legislative history of a subsequent amendment to the Copyright Act also supports the conclusion that temporary copies in RAM may satisfy the fixation requirement. The current text of sections 117(a) and (b) was added in 1980 as part of a package of amendments recommended by CONTU. The House report accompanying the 1980 amendments did not explain the intent of the legislation, other than to implement CONTU's recommendations.[350] The CONTU Report sets forth its reasons for recommending the statutory additions, which Congress enacted with few changes.[351]

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[349] 1976 House Report, *supra* note 35, at 52 (quoting 17 U.S.C. § 102(a)).

[350] Referring to the portion of the bill that added the section 101 definition of "computer program" and section 117, the House committee report stated only that it "embodie[d] the recommendations of the Commission on New Technological Uses of Copyrighted Works with respect to clarifying the law of copyright of computer programs." H.R. Rep. No. 1307 (Part I), 96th Cong., 2d Sess. 23 (1980).

[351] The status of the CONTU Report as legislative history is discussed *supra*, at 29.

CONTU clearly viewed reproductions in computer memory as "copies," implicating a copyright owner's exclusive rights under section 106.[352] In 1976 Congress considered the problems associated with computer uses of copyrighted works not to be sufficiently developed for a definitive legislative solution.[353] Congress enacted what was commonly referred to as a "moratorium" provision in section 117, which preserved the status quo on December 31, 1977 as to use of copyrighted works in conjunction with computers and similar information systems.[354] In recommending the repeal of that provision, CONTU stated:

> The 1976 Act, without change, makes it clear that the placement of any copyrighted work into a computer is the preparation of a copy and, therefore, a potential infringement of copyright. . . .
>
> Because the placement of a work into a computer is the preparation of a copy, the law should provide that persons in rightful possession of copies of programs be able to use them freely without fear of exposure to copyright liability. . . . One who rightfully possesses a copy of a program, therefore, should be provided with a legal right to copy it to that extent which will permit its use by that possessor. This would include the right to load it into a computer . . . .[355]

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[352] CONTU Report, *supra* note 61, at 13. It is reasonable to assume that in 1978, when the CONTU Report was published, reference to "placement of a work into a computer" was understood to include reproduction in volatile memory. Although early generations of computers used non-volatile ferrite core memory, volatile solid-state memory was in wide use by the early 1970s.

[353] 1976 House Report, *supra* note 35, at 116.

[354] Pub. L. No. 94-553, 90 Stat. 2541 (1976); 1976 House Report, *supra* note 35, at 116. Former section 117 read as follows:

> Notwithstanding the provisions of sections 106 through 116 and 118, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in action brought under this title.

[355] CONTU Report, *supra* note 61, at 13.

iv. Judicial interpretation

Every court that has addressed the issue of reproductions in volatile RAM has expressly or impliedly found such reproductions to be copies within the scope of the reproduction right. We are aware of no cases that have reached the contrary conclusion.

The seminal case on the subject is *MAI Sys. Corp. v. Peak Computer, Inc.*,[356] in which the defendant's loading of operating system and diagnostic software into computer memory in violation of a license agreement was held to be an infringement.[357] In reaching that conclusion, the Ninth Circuit examined the definitions in section 101 and found that "loading of copyrighted software into RAM creates a 'copy' of that software."[358] The court noted that, although it was aware of no prior cases holding that reproductions in RAM were copies, "it is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act."[359] After making note of evidence in the record that, once the software was loaded into RAM, the defendant was able to view the system error log in order to diagnose a problem with the computer, the court reasoned that this evidence demonstrated "that the representation created in the RAM is 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'"[360] Consequently, the court affirmed the district court's conclusion that "a 'copying' for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM."[361]

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[356] 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994).

[357] *MAI v. Peak* has generated controversy on two fronts. As discussed *infra*, at 120, the holding regarding RAM copying has been consistently upheld by later courts, but criticized by a number of academic commentators. In addition, the implications of the case for competition in the computer repair industry led in 1998 to a specific legislative exemption for certain temporary copies in RAM. *See* discussion *infra*, at 30.

[358] *Id.* at 518.

[359] *Id.* at 519.

At least nine other courts have followed *MAI v. Peak* in holding RAM reproductions to be "copies," although not all have ultimately found the defendant to be liable for infringement.[362] Even before *MAI v. Peak*, the Fifth Circuit had stated that "the act of loading a program from a medium of storage into a computer's memory creates a copy of the program."[363] The factual context suggests that the court was referring to RAM. Several other cases have also held that loading a computer program into a computer entails making a copy, without mentioning RAM specifically.[364]

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[360] *Id.*

[361] *Id.*

[362] *See Stenograph L.L.C. v. Bossard Assocs.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998) (holding that "a RAM reproduction constitutes a copy"); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 600 (5th Cir. 1996) (citing *MAI v. Peak,* holding that copy is made when software is loaded into computer's RAM; defendant is not enjoined from making such copies, however, because it is likely to prevail on its defense of copyright misuse); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir.), *cert. denied*, 116 S. Ct. 1015 (1995) (loading of software into RAM is "copying" for purposes of the Copyright Act); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999); *Wilcom Pty. Ltd. v. Endless Visions*, 1998 U.S. Dist. LEXIS 20583, *9 (E.D. Mich. Dec. 2, 1998) ("a temporary copy of the program's object code in . . . RAM . . . is sufficiently 'fixed in a tangible medium of expression' to constitute an infringing copy under the Copyright Act"); *In re Independent Serv. Orgs. Antitrust Litigation*, 23 F. Supp. 2d 1242, 1245 (D. Kan. 1998) ("use (and hence reproduction into random access memory ('RAM')) of diagnostic software . . . was not authorized by [plaintiff] and hence constituted infringement"); *Marobie-FL, Inc. v. National Assoc. of Fire Equip. Dists.*, 983 F. Supp. 1167, 1176-78 (N.D. Ill. 1997) (citing *MAI v. Peak*, finding RAM copies to be fixed as long as they are capable of being perceived); *Religious Tech. Center v. Netcom On-line Comm.*, 907 F. Supp 1361, 1368 (N.D. Cal. 1995) ("In the present case, there is no question after *MAI* that 'copies' were created . . . ."; preliminary injunction denied, however, because plaintiff did not demonstrate a substantial likelihood of success on the merits); *In re Independent Serv. Orgs. Litigation*, 910 F. Supp. 1537, 1541 (D. Kan. 1995) ("We agree with the court in [*MAI v. Peak*], that transferring a computer program from a storage device to a computer's RAM constitutes a copy for purposes of copyright law."); *Advanced Computer Servs. of Mich., Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (where "a copyrighted program is loaded into RAM and maintained there for minutes or longer, the RAM representation of the program is sufficiently 'fixed' to constitute a 'copy' under the Act"). See also, *Ohio v. Perry*, 41 U.S.P.Q.2d (BNA) 1989 (Ohio App. 1997) (following *MAI v. Peak* in concluding that state charge of unauthorized use of property stemming from the unauthorized posting of software on a computer bulletin board service was preempted by the Copyright Act because the defendant's acts constituted copyright infringement).

[363] *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 260 (5th Cir. 1988).

v. Commentary

In contrast to the apparent unanimity among courts that have considered the issue of RAM copying, legal scholars are divided on the question – which may account for the characterization of *MAI v. Peak* by at least one commenter as "controversial."[365] Although some academics have expressed support for the conclusion that the reproduction right can embrace RAM copies,[366] much commentary on the subject has criticized the holding of *MAI v. Peak*.[367]

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[364] *See, e.g.*, *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 931-32 (N.D. Cal. 1996) (following *MAI v. Peak*); *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 235 (7th Cir. 1995) ("Neither party disputes that loading software into a computer constitutes the creation of a copy under the Copyright Act"; nonetheless, court affirms summary judgment for defendant because of plaintiff's failure to establish copying as a factual matter); *Roeslin v. District of Columbia*, 921 F. Supp. 793, 800 (D.D.C. 1995) ("The placement of a copyrighted program into a computer, or the loading of a copyrighted program into a computer (which occurs every time [one] uses the program), constitutes 'copying' the program for purposes of the Copyright Act."); *Tricom, Inc. v. Electronic Data Sys. Corp.*, 902 F. Supp. 741, 745 (E.D. Mich. 1995) (loading software onto mainframe computer constitutes copying under the copyright law); *Hubco Data Prods. Corp. v. Management Assistance, Inc.*, 219 U.S.P.Q. (BNA) 450, 456 (D. Idaho 1983) (statutory definition of "copy" "makes clear that the input of a work into a computer results in the making of a copy, and hence that such unauthorized input infringes the copyright owner's reproduction right").

[365] C-DFC, at 3.

[366] *See, e.g.*, 1 William F. Patry, Copyright Law and Practice 171(1994); David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 Harv. J. of Law & Tech. 1, 10-11 (1996); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum L. Rev. 1466, 1475-77 (1995); I. Trotter Hardy, *Symposium: Copyright Owners' Rights and Users' Privileges on the Internet: Computer RAM "Copies": A Hit or a Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 Dayton L. Rev. 423, 427-28, 456-60 (1997).

[367] *See, e.g.*, Mark A. Lemley, *Symposium: Copyright Owners' Rights and Users' Privileges on the Internet: Dealing with Overlapping Copyrights on the Internet*, 22 Dayton L. Rev. 547, 550-51 (1997); James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 Harv. J. Law and Tech. 47, 88-94 (1996); Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 Iowa L. Rev. 1395, 1452-53; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 269-74 (1996); Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, Communications of the ACM, Dec. 1994, at 21, 22 ("*Legally Speaking*"); Jessica Litman, *The Herbert Tenzer Memorial Conference: Copyright in the Twenty-First Century: The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29, 42-43 (1994).

The criticism of *MAI* has rested mainly on three arguments: (1) that the text and legislative history of the Copyright Act indicate that Congress did not intend that "the temporary storage of a copyrighted work in a computer's memory . . . be regarded as an infringing reproduction";[368] (2) that the reasoning employed in *MAI v. Peak*, if carried to its logical extreme, would lead to absurd results ; and (3) that *MAI v. Peak* is merely the decision of one appellate court, and should not be followed.

The first argument — that Congress did not intend RAM reproductions to be copies — is addressed in the foregoing analysis. Except for reproductions that do not persist long enough to be perceived, reproduced or otherwise communicated, the text and legislative history of the Copyright Act support the conclusion that Congress intended temporary reproductions in RAM to be "copies." In particular, the argument fails to explain Congress' view that it was necessary to adopt section 117(a)(1) to permit the making of temporary RAM copies in the course of using a computer program.

The second argument — that the reasoning employed in *MAI v. Peak* would lead to absurd results — is based on the implicit assumption that a finding of *copying* leads inevitably to a finding of *infringement*.[369] But determining that a reproduction in RAM implicates the reproduction right does not mean that there is liability every time a RAM copy is made.[370] As discussed in the following section, many uses of works that entail RAM copying are expressly or impliedly licensed. In addition, exemptions, such as fair use, that apply to copying in other contexts apply in this context as well. Several recent exemptions have been adopted into U.S. law specifically to address RAM copying in particular contexts.[371] If existing exceptions are determined to be insufficient and current law could still lead to inappropriate results, additional exceptions could be adopted in the future to deal with those circumstances.

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[368] Pamela Samuelson, *The Copyright Grab*, Wired, Jan. 1996, at 4.

[369] One example that has been made to support this argument is that, by the logic of *MAI v. Peak*, "holding a mirror up to a book would be infringement because the book's image could be perceived there for more than a transitory duration, i.e., however long one has the patience to hold the mirror." *Legally Speaking*, *supra*, n.13; *see also* Litman, *supra*, at 42 n.63 (quoting *Legally Speaking*). *MAI v. Peak* does not compel a finding of copying in this hypothetical, however. A reflection on a mirror is not fixed. This conclusion flows not from its temporary nature, but from the fact that the work reflected off the mirror's surface is not "embodied" in the mirror. By contrast, there was no question that the work in *MAI v. Peak* was "embodied" in RAM by virtue of the electrical charges stored in

The third argument — that *MAI v. Peak* is merely the decision of one appellate court, and therefore should not be followed — has been overtaken by events. As discussed above, a judicial consensus has formed around the holding in *MAI v. Peak* since these commentators' articles were written. The D.C. Circuit, the Fifth Circuit and several trial courts have endorsed the Ninth Circuit's holding, without contradiction by any other court.[372]

An additional argument (not related specifically to *MAI v. Peak*) has been leveled at the application of the reproduction right to transient copies made in the course of transmitting material on a packet-switched digital network. The crux of this argument is that, since the

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the RAM circuitry. The issue was whether the embodiment in RAM was sufficiently permanent or stable to satisfy the fixation requirement.

[370] For example, liability was not imposed in several of the cases cited above that followed *MAI v. Peak*. *See, e.g.*, *Religious Tech. Center*, 907 F. Supp. 1361; *DSC Communications*, 81 F.3d 597.

[371] *See, e.g.*, titles II and III of the DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2886-2905 (1998).

[372] Moreover, two Courts of Appeals appear to have reached the same conclusion, at least implicitly, before the *MAI v. Peak* decision. *See NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 235 (7th Cir. 1995); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 260 (5th Cir. 1988).

material is broken down into packets for transmission across the network, it is only those packets representing portions of the work that are copied. No copies of the entire work will exist at any intermediate point between the sender and the recipient. Therefore there are no "copies" of the work except in the recipient's computer where the packets are reassembled (and not even there in the case of streaming audio, where the packets are rendered in real time and discarded).[373]

There are a number of problems with this argument. To determine whether the reproduction right is implicated, the focus is on whether there has been a fixation in a material object, not on the quantity of material that has been so fixed. The reproduction right is not limited to copies of an entire work. Photocopying a page or paragraph out of an encyclopedia implicates the reproduction right and may, in appropriate circumstances, be an infringement. Whether or not a copy of a portion of a work is infringing is a question not of whether the reproduction right is implicated, but of whether the copying is substantial.

In addition, this argument fails to account for the fact that in many instances, transient copies of a number of packets may be made on a single machine in the course of transmission, that, in aggregate, represent a large portion or even the entirety of a work.

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[373] *See, e.g.*, David L. Hayes, *Advanced Copyright Issues on the Internet*, at 5 (May 1998) (available on the Internet at www.fenwick.com/pub/copyright.pdf).

vi. International considerations

The treatment of temporary copies under U.S. law that is described above is consistent with the scope of the reproduction right that is mandated in Berne. Berne establishes the reproduction right in broad and general terms:

> Authors of literary and artistic works protected by this convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.[374]

On its face, the plain language of Article 9(1) includes temporary copies in RAM. Article 9(1) does not restrict the coverage of the right by the duration of a reproduction, and explicitly covers "any manner or form." As one "manner or form" of reproduction, temporary copies in RAM are covered by this formulation. This view has been advanced by Dr. Mihály Ficsor, then-Assistant Director General of WIPO, in a statement to Congress:

> It would be in conflict with the Berne Convention to deny the application of the right of reproduction just because a reproduction is not in tangible form, or because it is only temporary. . . . There is only one criterion, namely whether or not there is any fixation of the work in a computer memory, even for a very short time, but still for a sufficient time, so that it may serve as a basis for the perception of the signs, images and/or sounds in which the work is expressed, or for a parallel or subsequent reproduction.[375]

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[374] Berne, Art. 9(1). This provision is among those that are incorporated by reference in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and is thus a part of the U.S. obligations under its WTO commitments. Similarly, the WIPO Copyright Treaty ("WCT") also incorporates the Berne reproduction right by reference, and articles 7 and 11 of the WIPO Performances and Phonograms Treaty ("WPPT") give performers and producers of phonograms (sound recordings) the exclusive right to reproduce their sound recordings "in any manner or form." Neither the WCT nor the WPPT has yet come into force, although both are expected to enter into force during 2001. The WIPO Copyright Treaty is discussed further *infra* at pages 125-127.

[375] *Joint Hearing before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary and the Senate Committee on the Judiciary on H.R. 2441 and S. 1284* (Serial No. 38 (Part 1)), 104th Cong., 1st Sess. 57 (1995) (statement of Mihály Ficsor); see also, WIPO, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning The Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference*, Art. 7, explanatory notes 7.05-7.06 (Doc. No. CRNR/DC/4) (1996) (memorandum prepared by the Chairman of the Committees of Experts) ("Draft WIPO Copyright Treaty").

A similar conclusion was reached by a committee of governmental experts convened by WIPO and UNESCO in 1982 to examine copyright issues arising from the use of computers in creating or accessing works. In its report of the meeting, the committee stated:

> As for the act of input of protected subject-matter for storage purposes, it was generally agreed that it included at least reproduction of works on a machine-readable material support and their fixation in memory of a computer system. The Committee agreed that whatever this act may be, it involves fixation of works in a form sufficiently stable to permit their communication to an individual, and therefore it should be considered as governed by the international conventions and national legislation on copyright and therefore was subjected to the author's exclusive rights.[376]

Nonetheless, since temporary reproductions in RAM were not considered in the deliberations over the last revision of Berne in 1971, the principal treatise on the Berne Convention argues that Article 9(1) does not compel member states to include RAM copies within the scope of the reproduction right.[377] Events in the intervening decade and a half since that treatise was written, however, cast serious doubt on that conclusion.

In 1996 an effort was made to clarify the scope of the Berne reproduction right in the WCT (or, as it was styled up until its conclusion, the Berne Protocol). Article 7 of the draft copyright treaty that served as the basis for negotiations stated that "[t]he exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form."[378] The second paragraph of draft Article 7 would have permitted parties to adopt exceptions to the reproduction right as applied to temporary copies

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[376] *Second Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works* ¶33 (1982) (*reprinted in* UNESCO Copyright Bulletin, vol. XVI, no. 4, at 39, 43 (1982)).

[377] Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, at 373-74 (1987).

> in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.[379]

The Diplomatic Conference did not adopt proposed Article 7, but adopted the following Agreed Statement patterned, in part, on the joint WIPO/UNESCO statement from 1982 that is quoted above:[380]

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[381]

While the outcome of the 1996 Diplomatic Conference does not go as far in clarifying the reach of Article 9(1) of Berne as originally proposed, the statement that was adopted tends to confirm that Article 9(1) covers temporary copies in computer memory: "It follows from [the] first sentence [of the agreed statement] that Article 9(1) of the Convention, which extends to reproduction 'in any manner of [sic] form,' must not be restricted just because a reproduction is in digital form, through storage in an electronic memory, and just because a reproduction is of a temporary nature."[382]

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[378] Draft WIPO Copyright Treaty, *supra* note 124, Art. 7(1).

[379] *Id.*, Art. 7(2).

[380] *Supra*, at 125.

[381] WIPO, *Agreed Statements Concerning the WIPO Copyright Treaty* (WIPO Doc. No. CRNR/DC/96) (1996) (Agreed Statement concerning Article 1(4)).

Lending support to this interpretation of the Berne obligation, the national laws of a number of Berne countries (in addition to the United States) consider the making of temporary RAM copies to be within the reproduction right, either generally or in the context of computer programs. Although some countries expressed concern about applying the reproduction right to all temporary copies in RAM in the context of the debate at the December 1996 Diplomatic Conference, we are aware of no country that has excluded such copies from the reproduction right in its legislation.[383]

In 1991, the European Union[384] adopted a directive on software protection that required each of the member states[385] to protect computer programs under copyright law.[386] The Directive expressly requires that rightholders be granted the exclusive right to make temporary copies such as those made in RAM:

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[382] Ficsor, Digital Era, *supra* note 338, at 8.

[383] A court in Japan has, however, considered the absence of an explicit statement in that country's copyright statute to preclude protection for temporary copies. The court took the unusual step of noting the inequitable outcome of the case and suggested that a legislative response may be warranted. RIAJ v. Dai-Ichi Kosho (Tokyo Dist. Ct. 2000).

[384] The term "European Union" did not actually come into use until the Treaty of Maastricht came into force, after the adoption of the Software Directive.

[385] The EU presently consists of the following fifteen Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. The European Economic Area (EEA) consists of the following three Member States: Iceland, Liechtenstein and Norway. The EU and EEA Member States participate in one single market – EU Single Market – and are governed by the same basic rules (Acquis Communiautaire). EEA members are thus obliged to implement EU directives. Countries of Central and Eastern Europe that are seeking EU membership also generally conform their intellectual property laws to the relevant EU directives. Consequently, the directives have a direct impact beyond the fifteen Member States.

[386] *Council Directive on the Legal Protection of Computer Programs*, 91/250/EEC, 1991 O.J. (L 122) 42 (the "European Software Directive").

> Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:
>
> (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder . . . .[387]

The exclusive reproduction right is subject to an exemption that parallels section 117(1) of the U.S. Copyright Act, permitting acts that "are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose."[388] The Directive has been implemented in each of the member countries of the European Union.

Earlier this year the EU finalized a Directive on Copyright and Related Rights in the Information Society[389] that had been under consideration since 1997 and is intended, *inter alia*, to implement the WIPO treaties in the EU. The Directive includes temporary copies generally within the reproduction right,[390] but then mandates that Member States enact an exemption for:

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[387] *Id.*, Art. 4.

[388] *See id.*, Art. 5(1) .

[389] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167/10 2001) ("Information Society Directive").

[390] "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part . . . ." *Id.*, Art. 2.

> Temporary acts of reproduction . . . which are transient or incidental, which are an integral and essential part of a technological process whose sole purpose is to enable:
>
> (a) a transmission in a network between third parties by an intermediary or
>
> (b) a lawful use of a work or other subject matter . . . and which have no independent economic significance . . . .[391]

Member States must implement the Directive in their national laws within 18 months from the date it was published in the Official Journal of the European Communities – June 22, 2001.[392]

Australian copyright law also considers RAM copies of at least computer programs to implicate the reproduction right. In recommending to Parliament an exception to permit reproduction of computer programs for normal use,[393] the Australian Copyright Law Review Committee (CLRC) stated:

> [B]ecause most computer programs operate by reproduction in whole or in part in the random access memory (RAM) of the computer, each time the purchaser of a copy of a computer program uses the program he or she arguably exercises the copyright owner's right to reproduce the program in material form. Unless the user has the permission of the copyright owner, this will constitute an infringement of copyright and, although permission may be implied by the very act of marketing the program, the lack of express statutory sanction has been commented on.[394]

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[391] *Id.*, Art. 5(1).

[392] *Id.*, Art. 13(1).

[393] Copyright Act (1968), § 47B(1), as added by Copyright Amendment (Computer Programs) Act 1999.

[394] CLRC, *Computer Software Protection* 139 (1995). See also, *Ricketson*, at 374 & n.28 (discussing this aspect of Australian copyright law).

c. *Temporary Digital Copies Incidental to any Lawful Use*

Although many of the comments supported adoption of the blanket exception for incidental copies that was proposed in the Boucher-Campbell bill,[395] most of the arguments advanced in support of that proposal focused only on the specific issue of buffer copies made in the course of streaming transmissions of performances of musical works, including webcasting, rather than the broader issue of incidental copies generally. This suggests that another possible approach – legislation tailored to address the specific problems raised in the context of such streaming – should be examined.

In fact, no compelling evidence was presented to us during the course of our study that would support a blanket exception for incidental copies. Under current law, without any broad exception for incidental copies, we can discern no harm to users of copyrighted works. Nor does there appear to be any discernable evidence that electronic commerce is being impeded by the absence of a general exception for incidental copies. In fact, the opposite was shown – that electronic commerce is thriving. Moreover, we were presented with no evidence, outside the context of buffer copies of streaming audio, that consumers or businesses were facing claims for compensation or refraining from any activities as a result of legal uncertainty concerning the status of incidental copies.

On the other hand, we were presented with evidence that a blanket exception for incidental copies could have the unintended consequence of harming copyright owners and threatening new business models. For example, we heard testimony regarding the emerging practice of delivering software on demand, not for retention but for immediate use and subsequent disposal.[396] The software exists as a temporary copy on the user's computer while it is used, then the copy is discarded. The users never possess a permanent copy of the software; rather, copies of software are available to them as they need them. The only event in this model that has copyright significance is the making of the temporary copy that is incidental to the use of the software. In essence, the entire economic value of the transaction is in that temporary copy of the software.

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[395] *See* discussion *supra*, at 15.

Another, somewhat more prosaic example that was cited is the use of software on a local area network (LAN) beyond the scope of the applicable license.[397] Each user on the LAN can realize the full economic value of the software by running the software on his individual computer – an activity that entails making a temporary incidental copy in the PC's RAM.

In light of the lack of factual arguments to support a blanket exception for incidental copies, and the significant risks that such an exception would immunize copying that appropriates the economic value of the work, we do not recommend such an exception. We turn instead to an examination of a tailored approach that focuses on the specific problems that were brought to our attention.[398]

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[396] T-BSA, Simon, at 111-13.

[397] T-BSA, Simon, at 111.

[398] We note that similar problems were raised during the debates in Europe over the Information Society Directive. Recall that the Information Society Directive, *infra* at 23, provides an exception in Article 5(1) to the exclusive right of reproduction to allow certain acts of temporary reproduction subject to a number of conditions.

d. *Temporary Copies Incidental to a Licensed Digital Performance of a Musical Work*

One factual context for the temporary copying issue was repeatedly brought to our attention during the preparation of this Report: temporary buffer copies made in RAM in the course of rendering a digital music stream.[399] The buffer copies identified by the webcasting industry have the following characteristics: they exist for only a short period of time; at any given time they consist of only a small portion of the work; and they are incidental to a performance of the work that has been licenced by the copyright owner. Webcasters asserted that lack of clarity as to the legal status of buffer copies casts a shadow over their nascent industry, exposing them to demands for additional royalty payments and potential infringement liability. As we will discuss below, it appears that their concerns have merit.

The exception in Article 5(1) would appear to be broader than the exception we are recommending in this Report. Member States of the European Union have 18 months from the publishing date in the Official Journal of the European Communities – June 22, 2001 – to implement the Information Society Directive. What scope courts actually give this exception then remains to be seen.

Article 5 is to be read in conjunction with Recital 33, which reads as follows:

> (33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

Some Member States give no legal weight to recitals, however, so it will be necessary to await and look to their implementing legislation to see whether, and to what degree, those Member States put this language into effect.

[399] *See supra*, at 108.

i. Do buffer copies implicate the reproduction right?

The fact that the copies made in the course of streaming are of very small portions of a work does not necessarily render them noninfringing.[400] Even if each individual copy were to be considered a *de minimis* portion under the test for substantial similarity, the aggregate effect is the copying of the entire work. Moreover, increases in broadband use by consumers could ultimately result in the use of buffers that store the entire work for the duration of the performance. There does appear to be at least some risk that making buffer copies in the course of streaming infringes the reproduction right.

The fact that the copies are incidental to a licensed performance does not bear upon either the applicability of the reproduction right or the test for substantial similarity. It could, however, affect a fair use analysis.[401]

ii. Is the making of buffer copies in the course of streaming a fair use?

The webcasters have asserted that the making of buffer copies in the course of streaming should be considered a fair use, and one copyright owner representative has suggested that it is.[402] While we agree that there is, in fact, a strong case that the making of a buffer copy in this context is a fair use, we note that whether a use is fair is determined on a case-by-case basis by the courts.

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[400] *See supra*, at 122-123.

[401] *Cf. Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1992) (first factor weighed in favor of a defendant who engaged in disassembly of a computer program because the use was intermediate in the process of developing a noninfringing program).

[402] *See generally* comments and testimony by SIIA.

The judicially-created doctrine of fair use that is codified in section 107 of the Copyright Act[403] limits the copyright owner's exclusive rights, including the reproduction right as it applies to temporary copies. Section 107 sets out four nonexclusive factors to be considered in determining whether or not a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[404] In addition, as a doctrine that has its origins in equity, other equitable considerations may be brought to bear in a fair use analysis.

In analyzing the purpose and character of the use, courts inquire, *inter alia*, whether the use merely supplants the original work or instead adds a further purpose or different character. In other words, this factor asks "whether and to what extent the new work is 'transformative.'"[405]

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[403] § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[404] 17 U.S.C. § 107.

[405] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Although "transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[406]

The making of a buffer copy is not transformative. The portion of the work that is copied into the buffer is an identical reproduction of the corresponding portion of the original. "There is neither new expression, new meaning nor new message."[407] While the copy is made in order to effectuate a performance, this fact, in itself, would not render the use transformative.[408]

Another element that courts examine under this factor is whether the use is commercial or noncommercial.[409] Uses that are of a "commercial nature" are generally disfavored under fair use.[410] However, the commercial nature of a particular use does not necessarily lead to the conclusion that an activity is not fair use.[411] Moreover, the characteristics of a particular commercial use should be considered in determining whether the first factor weighs in favor of the copyright owner.[412]

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[406] *Id.* (citations omitted).

[407] *Infinity Broadcast Corp. v. Kirkwood,* 150 F.3d 104, 108 (2d Cir. 1994) (quoting the District Court opinion, 965 F. Supp. 553, 557 (S.D.N.Y. 1997)).

[408] *Cf. Id.* (difference in purpose is not the same thing as transformation).

[409] *Campbell*, 510 U.S. at 584-85 (1994). In fact, 17 U.S.C. § 107 expressly includes "including whether such use is of a commercial nature or is for nonprofit educational purposes" as a consideration under the first fair use factor.

[410] 17 U.S.C. § 107 (first factor). *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).

[411] *Campbell,* 510 U.S. 569, 584-85 (1994).

Inasmuch as the buffer copy is made to further a commercial activity (commercial streaming of music) it is a commercial use. However, it is not a superseding use that supplants the original. It is a necessary incident to carrying out streaming. The purpose of making the copy is solely to render a performance that is fully licensed. There is no separate exploitation of the buffer copy. It is a productive use that serves a socially beneficial end – bringing a licensed performance to a consumer. As such, it can be readily concluded that the use is for "a legitimate, essentially non-exploitative purpose, and that the commercial aspect of [the] use can best be described as of minimal significance."[413]

Notwithstanding the commercial and non-transformative nature of the making of a buffer copy, the essentially "non-exploitative" purpose of the use — i.e., to enable a use that has been authorized by the copyright owner and for which the copyright owner typically has been compensated — persuades us that the first factor favors the user.

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[412] *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (1992); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).

[413] *Sega*, 977 F.2d at 1523. A parallel can be drawn to "time-shifting," which the Supreme Court held to be "a noncommercial, nonprofit activity" in *Sony*. In *Sony*, the Court noted that "time-shifting merely enables viewer to see such a work which he has been invited to witness in its entirety free of charge . . . ." *Sony*, 464 U.S. at 449. The buffer copy merely enables the user to listen to a work that the transmitting entity is licensed to stream to him. *Campbell*, 510 U.S. at 591 (No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes.)

It is generally accepted that in analyzing the second fair use factor — the nature of the copyrighted work — creative works are subject to a more limited scope of fair use than informational works.[414] Musical works that are copied into buffers while they are streamed are generally at the creative end of the spectrum that is generally subject to a narrower scope of fair use. Of course, the same can be said of the motion pictures and television programs, the copying of which for time-shifting purposes the Supreme Court held to be a fair use. This factor would appear to favor the copyright owner, but, as demonstrated by the *Sony* case, it by no means precludes the conclusion that the making of a buffer copy is a fair use.

In analyzing the third factor — the amount and substantiality of the portion used in relation to the copyrighted work as a whole — copying an entire work generally weighs against a finding of fair use.[415] "While 'wholesale copying does not preclude fair use per se,' copying an entire work 'militates against a finding of fair use.'"[416]

At any given time, the content of the buffer comprises only a small, fairly insubstantial portion of the work. In aggregate, though, the buffer copies constitute the entire work. Even if the making of buffer copies is considered to be a reproduction of the entire work, that does not preclude a finding of fair use. There are a number of circumstances where courts have considered copying of an entire work to be fair use. For example, in *Sony* the time-shifting of entire motion pictures or television programs was held to be a fair use.[417] In *Sega v. Accolade*, the court, recognizing that disassembly of a computer program necessarily entailed making digital reproductions of the entire work, found this factor to weigh in favor of the copyright owner, but to be "of very little weight."[418]

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[414] *Campbell*, 510 U.S. at 586; *Diamond v. Am-Law Corp.*, 745 F.2d 142, 148 (2d Cir. 1984).

[415] *Infinity Broadcast Corp. v. Kirkwood,* 150 F.3d 104, 109 (2d Cir 1998).

[416] *Worldwide Church*, 227 F.3d at 1118 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)).

To the extent that the portion residing in the buffer at any given time is examined in isolation, it represents a *de minimis* portion of the entire work and this factor would weigh in favor of the user. If, however, all the buffer copies are aggregated to constitute the entire work, this factor would favor the copyright owner. But this factor would be of very little weight in the overall analysis. Although the entire work is reproduced, in the aggregate, the entire work must be copied to achieve its productive purpose – to render the performance of the work over the Internet. In achieving this purpose, the individual packets buffered contain no more than is reasonably necessary to effectuate that function.[419]

"Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."[420] In analyzing the fourth fair use factor with regard to the making of a temporary buffer copy, the effect of the use on the actual or potential market for the work appears to be minimal, if indeed there is any effect at all. The buffer copy has no economic value independent of the performance that it enables, so there appears to be no conceivable effect upon the market for or value of the copyrighted work. In *Sony*, the Supreme Court directs us to inquire whether "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work."[421] There is no market for buffer copies other than as a means to block an authorized performance of the musical works.[422] Nor can it be said that record sales are being reduced because of the making of buffer copies. The copy merely facilitates an already existing market for the authorized and lawful streaming of works. This factor strongly favors the user.

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[417] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (acknowledging that time-shifting necessarily involved making a complete copy of a protected work).

[418] *Sega*, 977 F.2d at 1527.

[419] *See Campbell*, 510 U.S. 569, 588 (1994) ("Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original".)

[420] *Harper & Row*, 471 U.S. 539, 566-67 (1985).

Of the four statutory factors, the first and fourth favor the user, and the second factor appears to favor the copyright owner. The third factor favors the copyright owner, but should be accorded little weight. Of course, fair use is not determined simply by tallying up the factors that favor either party. Rather, fair use is an "equitable rule of reason."[423] It is especially appropriate where, as here, the statutory factors do not favor either the copyright owner or the user lopsidedly, to weigh other equitable considerations in carrying out the balancing inherent in an equitable rule of reason. We identified three.

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[421] *Sony*, 464 U.S. at 451.

[422] *Campbell*, 510 U.S. at 592. This could be analogized to requiring a license for a parody of a work – a successful noninfringing parody is lawful notwithstanding a copyright owner's subsequent willingness to offer a license.

[423] *Sony*, 464 U.S. at 448 (quoting 1976 House Report, supra note 40, at 65).

First, the sole purpose for making these buffer copies is to permit an activity that is licensed by the copyright owner and for which the copyright owner receives a performance royalty. In essence, there appears to be some truth to the allegation made by some commenters that copyright owners are seeking to be paid twice for the same activity.[424] Demanding a separate payment for the copies that are an inevitable by-product of that activity appears to be double-dipping, and is not a sound equitable basis for resisting the invocation of the fair use doctrine.

Second, it is technologically necessary (at least given the nature of the Internet today, and quite possibly well into the future) to make buffer copies in order to carry out a digital performance of music over the Internet. The work cannot be experienced without copying it. This circumstance appears analogous to facts that were before the Ninth Circuit in *Sega v. Accolade*. There the court found that a computer program could not be read and understood by a programmer without disassembling it, and it could not be disassembled without copying it.[425] Those elements favored the court's holding that disassembly in that case was a fair use.

Third, the buffer copies exist for too short a period of time to be exploited in any way other than to enable the performance of the work. Absent intervention by the consumer and use of technologies to get around the normal functioning of the rendering software, the buffer copy is continually overwritten and ceases to exist once the song is finished playing. No further use can be made of the buffer copy because it is not retained: at the end of the transmission the consumer is left with nothing but the fond memory of a favorite song. The use of the copy is narrowly tailored to the licensed performance of the work. This circumstance favors a finding of fair use.

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[424] T-DIMA, Greenstein, at 275; T-Launch, Goldberg, at 307.

[425] *Sega*, 977 F.2d at 1525-26.

On balance, we find the case that the making of temporary buffer copies to enable a licensed performance of a musical work by streaming technology is a fair use to be a strong one. We do recognize, however, that fair use is determined on a case-by-case basis and, as such, lacks the certainty of a specific exception. Representatives of the webcasting industry expressed concern in their comments that, given copyright owners' willingness to assert claims based on the making of temporary buffer copies, the fair use defense in this context may be too uncertain a basis for making rational business decisions.

e. *Recommendations*

i. A blanket exception for temporary copies incidental to a lawful use is not warranted

We recommend against the adoption of a general exception from the reproduction right to render noninfringing all temporary copies that are incidental to lawful uses. Outside the context of buffer copies that are incidental to a licensed performance of a work,[426] no compelling case has been made that a broad exception is needed.[427] However, the risks of a blanket exception appear significant.[428]

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[426] *See* discussion *infra*, at 142-145.

[427] *See* discussion *supra*, at 131.

[428] *See* discussion *supra*, at 130-131.

Copyright owners have pointed out with justification that the reproduction right is the "cornerstone of the edifice of copyright protection"[429] and that exceptions from that right should not be made lightly. In the absence of specific, identifiable harm, the risk of foreclosing legitimate business opportunities based on copyright owners' exploitation of their exclusive reproduction right counsels against creating a broad exception to that right.

The risks associated with a narrowly defined exception are less significant. We believe that Congress' tailored approach taken in the Computer Maintenance Competition Assurance Act[430] to the question of temporary copies to be the appropriate model. Presented with specific examples of identifiable harm to competition in the computer repair and maintenance industry in the form of infringement suits premised on temporary copying, Congress created a narrow exemption to deal with that specific problem.[431] We believe the same approach should be taken here.

ii. Temporary copies incidental to a licensed digital performance should result in no liability

We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.

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[429] T-Copyright Industry Orgs., at 243.

[430] Title III of the DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998).

[431] *See supra*, at 30.

The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right.[432]

The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place — to the detriment of copyright owners, webcasters, and consumers alike — or to extract an additional payment that is not justified by the economic value of the copies at issue. Congressional action is desirable to remove the uncertainty and to allow the activity that Congress sought to encourage through the adoption of the section 114 webcasting compulsory license to take place.

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[432] It seems unlikely that this particular problem would arise in other industries where the copyright owner's public performance right and reproduction right are administered by the same entity. We note, for example, that the issue of temporary buffer copies of sound recordings has not been raised as an issue, and does not appear to be the subject of any demands for additional royalties. In the recording industry, the reproduction right and digital public performance right are generally held by the same entity.

A close analogy to the present circumstances can be found in the adoption of an exemption for so-called ephemeral recordings in section 112 of the Copyright Act. Ephemeral recordings are copies that are made and used by a transmitting organization to facilitate its transmitting activities. Congress saw fit to exempt those copies when the transmission is either made under license (including the compulsory license for webcasting and subscription digital transmissions) or under an exemption from exclusive rights (as in the case of analog public performances of sound recordings). As with temporary buffer copies, ephemeral recordings are made for the sole purpose of carrying out a transmission. If they are used strictly in accordance with the restrictions set forth in section 112,[433] they have no economic value independent of the public performance that they enable.[434]

We note the suggestion by one copyright owner group that statutory change is unnecessary because the issue of buffer copies can be addressed under the aegis of the fair use doctrine.[435] While we agree that the fair use defense probably does apply to such buffer copies,[436] this approach is fraught with uncertainty. It is conceivable that a court confronted with the issue could conclude that the making of buffer copies is not fair use. This risk, coupled with the apparent willingness of some copyright owners to assert claims based on the making of buffer copies, argues for statutory change.

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[433] An ephemeral recording may be retained and used only by the transmitting organization that made it, and no further copies may be reproduced from it; it may be used only for the transmitting organization's own transmissions or for archival preservation or security; and it must be destroyed within six months from the date that it was first transmitted to the public unless it is preserved exclusively for archival purposes. 17 U.S.C. § 112(a)(1). The use of temporary buffer copies is even more limited, since they are used only in the course of a single transmission, and do not endure any longer than the transmission.

[434] The webcasting amendments in section 405 of the DMCA created a new compulsory license to make ephemeral recordings of sound recordings under specified circumstances. 17 U.S.C. § 112(e). In light of the original purpose of section 112, and a subsequent legislative proposal to exempt certain ephemeral recordings used to facilitate the transmission of digital distance education materials, *see* S. 487, 107th Cong., 1st Sess. § 1(c) (2001), section 112(e) can best be viewed as an aberration. As we indicated in 1998 to the affected parties who championed this provision as part of an overall compromise, we saw no justification for the disparate treatment of broadcasters and webcasters regarding the making of ephemeral recordings. Nor did we see any justification for the imposition of a royalty obligation under a statutory licence to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption.

A number of the copyright owners expressed concerns about the potential unintended consequences of an exception from the reproduction right for temporary copies. We note that most of those comments were addressed to the proposal for a broader exception covering all temporary, incidental copies – a proposal that we have declined to endorse. We believe that the much narrower scope of our recommendation addresses these concerns.

We also note the criticism leveled at proponents of a temporary copy exception for webcasting – that they are seeking to have copyright owners subsidize certain types of business models by refraining from enforcing, or seeking compensation for one of their exclusive rights.[437] This is not a case where an additional use is being made of a work beyond the use that has been compensated. The making of buffer copies is a part of the same use. It is integral to the performance, and would not take place but for the performance. Permitting such incidental copies cannot be considered a "subsidy" by copyright owners.

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[435] T-SIIA, Kupferschmid, at 83-84, 131-32.

[436] *See supra*, at 133-141.

[437] T-Copyright Industry Orgs., p. 276.

Finally, we note that in informal communications with representatives of music publishers we have been apprised of concerns that streaming technology renders musical works vulnerable to digital copying.[438] A mechanical royalty on audio streams (based on the buffer copy) is viewed as a necessary protection against lost revenues from unauthorized copying. Although we are sympathetic to the concerns expressed by copyright owners about such technology, we find this reasoning flawed and unpersuasive.

Whether or not consumers make unauthorized copies of audio streams has nothing to do with temporary buffer copies. Those copies are not directly involved in the making of the unauthorized copy.[439] Requiring payment for a copy with no economic value because an unrelated copy with economic value might be made would be inappropriate.

iii. Public performances incidental to licensed music downloads should result in no liability

Given our recommendations concerning temporary copies that are incidental to digital performances of sound recordings and musical works, fairness requires that we acknowledge the symmetrical difficulty that is faced in the online music industry: digital performances that are incidental to digital music downloads.

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[438] "Total Recorder" is an example of one software product, available on the Internet, that permits unauthorized copying of streaming audio. Devices such as Total Recorder may violate section 1201(b). *See, e.g.*, 17 U.S.C. § 1201(b) and 17 U.S.C. § 114(d)(2)(C)(vi), (viii). If they do not, consideration should be given to amending section 1201(b) to prohibit such devices.

[439] The data in the stream buffer is compressed and may be subject to technological protections such as encryption. Consequently, it makes far more sense to capture the audio data after it has been rendered by the player software and is uncompressed and unprotected. Total Recorder works in this fashion, capturing the audio data on its trip from the player software to the sound card.

Just as webcasters appear to be facing demands for royalty payments for incidental exercise of the reproduction right in the course of licensed public performances, it appears that companies that sell digital downloads of music under either voluntary licenses from music publishers or the section 115 compulsory license, and voluntary licenses from record companies, are facing demands for public performance royalties for a technical "performance" of the underlying musical work that allegedly occurs in the course of transmitting it from the vendor's server to the consumer's PC.[440]

As with the issue of buffer copies made in the course of streaming, this appears to be an issue driven as much by the structure of the administration of copyright rights in the music industry as by technology. The issue simply would not seem to arise in other industries where the public performance and reproduction rights are exercised by the same entity.

We view this issue as the mirror image of the question regarding buffer copies. We recognize that the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place is an unsettled point of law that is subject to debate. However, to the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download. If it is a public performance, then, we believe that arguments concerning fair use and the making of buffer copies apply to that performance.[441] In any case, for the reasons articulated above, it is our view that no liability should result under U.S. law from a technical "performance" that takes place in the course of a download.

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[440] T-BMI, Berenson, at 163-65.

[441] *See* discussion of the application of fair use to buffer copies, *supra*, at 133-141.

3. Scope of Archival Exemption

Currently the archival exemption under section 117(a)(2) is limited to computer programs. This section allows the owner of a copy of a computer program to make or authorize the making of an additional copy of the program "for archival purposes," provided that "all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."[442] A number of arguments were advanced in the course of the study for an expansion of this archival exception in order to cover the kind of routine backups that are performed on computers and to allow consumers to archive material in digital format other than computer programs. The arguments for and against such an expansion are discussed below.

a. *Arguments in Favor of Expanding the Archival Exemption*

i. General vulnerability of content in digital form

Commenters asserted that consumers need to back up works in digital form because they are vulnerable. CONTU recommended that Congress create an exemption to permit archival (backup) copies of computer programs because they are vulnerable to "destruction or damage by mechanical or electrical failure."[443] This vulnerability stems not from the fact that they are computer programs, but because they are stored in digital form. The rationale given by CONTU for adopting an archival exemption for computer programs would apply equally to any work stored in digital format.[444]

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[442] 17 U.S.C. § 117(a)(2).

[443] CONTU Report, *supra* note 61 at 13.

It would be perfectly consistent with CONTU's recommendations and Congress' enactment of section 117 to extend the archival exemption to protect against technical vulnerabilities that afflict the present day use of digital files. The digital media collection on a hard drive is also vulnerable to technical failure such as hard disk crashes, virus infection, or file corruption.

ii. Mismatch between section 117 and current archival practices

Evidence has been presented noting that the archival exemption under section 117 does not permit the practices and procedures most people follow for backing up data on a computer hard drive. The commenters stated that an amendment to section 117 would be necessary for it to reflect the reality of how many computer users (and most business users) actually back up information.

Section 117 appears to have been written to address a particular style of archiving: the making of a copy of an individual program at the time the consumer obtains it. However, we were told that most businesses, and many individuals, perform periodic backups of everything on their disk (and not just one backup copy upon purchase of the computer program). This backup copy includes all installed computer programs, together with any related data files, various configuration files, and all of the user's own data, including any copyrighted works that have been downloaded. Section 117 does not permit the copying of anything other than the computer programs.[445]

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[444] It would have been well within CONTU's mandate (to make recommendations concerning "the reproduction and use of copyrighted works of authorship. . . . in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information") to have proposed an archival exemption applicable to all works in digital form. CONTU Report, *supra* note 61, at 4. It did not do so, for reasons that were not articulated in the Report.

Section 117 requires the destruction of any archived copy once possession of the program ceases to be rightful. Possession – or at least use – of a program typically ceases to be rightful once the user acquires an upgraded version.[446] A literal reading of section 117 would require the user to go through all of the backup tapes, CD-Rs and other archival media, identify each of the files that constitute the earlier version of the computer program, and attempt to delete them. This is neither practical nor reasonable.

Based on the evidence presented during the course of preparing this Report, there is a fundamental mismatch between accepted, prudent practice among most system administrators and other users, on one hand, and section 117 on the other. As a consequence, few adhere to the letter of the law.

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[445] It was suggested by one commenter that even data files associated with a computer program could not be archived under section 117. WST-Hollaar.

[446] T-Hollaar, at 94, 150. For example, the Symantec License and Warranty for Norton SystemWorks™ provides that "YOU MAY NOT: . . . use a previous version or copy of the Software after you have received a disk replacement set or an upgraded version as a replacement of the prior version, . . . ".

b. *Arguments Against Expanding the Archival Exemption*

i. Lack of demonstrated harm

While the mismatch between section 117 and sound backup practices is indisputable, nobody was able to identify any instance where a consumer has suffered any harm as a result of the limited scope of the archival exemption. There are two principal ways that consumers could be harmed: by refraining, to their detriment, from activities because they do not fall within the scope of the exemption; and by being subject to legal claims from copyright owners for conduct that falls outside the scope of the exemption. Neither appears to be occurring.

It was pointed out several times during the course of this study that the backup copies that consumers make from their hard drives generally embody all files, including digital downloads. If this activity is so commonplace, it does not appear that consumers are risking their investment in digital media to conform their conduct to section 117. Nor has anyone provided any evidence that any consumer has ever faced litigation, or even the threat of litigation, for making a backup copy of a hard drive containing material that fell outside the scope of the archival exception under section 117. To the contrary, evidence was presented that consumers who back up their hard drives generally do so outside the parameters of section 117 with no repercussions whatsoever.

ii. Justification for section 117(a)(2) has diminished

The need to make backup copies of computer programs has diminished. It was pointed out in the comments that today section 117(a)(2) has little, if any, utility. Almost all the software sold in the United States is sold on CD-ROM.[447] The CD-ROM serves as the backup copy once a computer program is loaded from the CD-ROM to one's computer. CD-ROMs have an estimated failure rate of significantly less than 1%.

It has been argued that there would seem to be little point to expanding section 117(a)(2) to other copyrighted works when current law does not appear to be causing any real-world problems and the justification for the provision may no longer exist. While this may be the case today, we acknowledge that the sale of computer software as digital downloads is on the rise, and that may increase the need for an archival exemption.

iii. Bad faith use of the section 117 defense

It was brought to our attention during the course of this study that section 117 is being used by some members of the public to justify conduct that it does not permit because of the public's misunderstanding of the purpose of the section. We were told that persons engaged in software and content piracy are also using section 117 to justify their activities. For example, one of the commenters noted that people auction off their so-called backup copies of their computer software or make pirate software available on websites, ftp sites or chat rooms under the guise of the section 117 back-up copy exception.[448]

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[447] According to PC Data, in 1999, ninety-seven percent of all the software sold in the United States was sold on CD-ROM and in 2000, ninety-eight percent of all software was sold on CD-ROM. R-SIIA, at 9.

[448] C-SIIA, at 4.

c. *Recommendations*

We recommend that Congress amend the copyright law in one of the two ways that we outline below. We acknowledge that persuasive arguments were presented on both sides of the question whether to expand the archival copy exemption that is currently in section 117(a)(2). On balance, after examining those arguments and taking into consideration the additional concerns that we discuss below, we conclude that a statutory change is desirable.

In support of a recommendation to revise the archival exemption, it has been demonstrated to our satisfaction that there is a fundamental mismatch between section 117 and current archival practices. Those practices – to which copyright owners have not objected – do not harm right holders, are necessary for consumers to protect their investment in digital materials, and should be permitted to continue.

In support of making no change to the scope of the exemption, there has been a complete absence of any demonstrated harm to the prospective beneficiaries of an expanded archival exemption.[449] Any dramatic expansion of a fairly modest copyright exemption carries with it the risk of causing unintended consequences. Moreover, we believe that a strong case can be made that most common archival activities by computer users[450] would qualify as fair use.

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[449] This factor is an element that distinguishes the archival exemption issue from the buffer copy issue discussed *supra*.

[450] We are assuming for purposes of this fair use analysis that the activity consists of backing up all or a portion of the contents of a hard drive on a removable medium for retention against the possibility of accidental destruction of that material *and for no other purpose*. Of course, this analysis would not apply to any infringing material on a hard drive.

The purpose of the use – backing up the material on a computer's hard drive – is merely to safeguard lawfully-obtained copies against accidental destruction. Although the use is not transformative, it probably would not be considered commercial either.[451] The use does not supplant the original because it does not entail a separate exploitation of the work – or any exploitation unless that original copy is damaged or destroyed. As with time-shifting, backing up is "a legitimate, essentially non-exploitative purpose." This factor appears to favor the user.

The second factor – nature of the work – would appear to favor copyright owners since many of the works being copied are clearly very creative in nature, and are thus subject to a more limited scope of fair use than informational works.[452] But this by no means precludes the conclusion that making backup copies is a fair use.[453]

The third factor – the amount and substantiality of the portion used – might also appear to weigh against a finding of fair use since the entire work is copied.[454] However, this too does not preclude a finding of fair use.[455] Here, since the purpose of the activity being engaged in is to protect one's legally obtained copy through archiving, copying the entire work is necessary.

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[451] *See Campbell*, 510 U.S. at 579 (discussing transformative use); *id.* at 584-85 (discussing commercial use).

[452] *Id.* at 586; *Diamond*, 745 F.2d 142, at 148 (2d Cir. 1984).

[453] For example, copying of entire motion pictures for time-shifting purposes was considered a fair use in *Sony*. Motion pictures generally fall at the creative end of the spectrum.

[454] *Infinity Broadcast Corp.*, 150 F.3d 104, at 109 (2d. Cir. 1998).

[455] *Sony*, 464 U.S. 417, 449-50 (1984).

The fourth factor – effect of the use on the market – weighs strongly in favor of fair use. The effect on the market for the copyrighted work will be nonexistent. The copies being made under this fair use analysis are being made for the sole purpose of safeguarding one's investment – a vulnerable investment due to susceptibility of digital media to accidental damage or destruction. The archival copies do not enter the market at any point and since they are copies of works for which the copyright owner has already been compensated, there is no harm to the owner in lost revenue. It is our conclusion that a strong case can be made that the use being made is fair.

If the analysis ended there, recommending no statutory change could be a viable option. Another element to consider, however, is the interplay between sections 107 and 109. It appears that the language of the Copyright Act could lead a court to conclude that, by operation of section 109, copies of works made lawfully under the fair use doctrine may be freely distributed.

Section 109 permits "the owner of a particular copy or phonorecord lawfully made" under title 17 to distribute that copy without the copyright owner's permission.[456] To the extent that section 107 permits a user to make backup copies of works stored on a hard drive, those backup copies are lawfully made and the user owns them. Section 109, on its face, appears to permit the user, as the owner of a lawfully made backup copy, to "sell or otherwise dispose of the possession" of that backup copy.[457]

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[456] 17 U.S.C. § 109(a).

Authority is unclear over the application of the first sale doctrine to lawfully made copies that have not been distributed with the copyright owner's consent. Section 109 is commonly understood to codify the "first sale doctrine," which implies that an actual sale, or at least an authorized distribution, must occur before the doctrine applies. However, the statutory text only requires that the copy be lawfully made, and makes no reference to a prior authorized sale or other distribution.[458]

The legislative history of section 109 can be read to support both views. In one sentence, the 1976 House Report suggests that an actual first sale is required to trigger section 109, which it asserts "restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means . . . ."[459] But this position is undercut by a passage on the same page, which asserts that "the disposition of a phonorecord legally made under the compulsory licensing provisions of Section 115 would not

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[457] *Id.* Backup copies made pursuant to § 117(a)(2), though "lawfully made," are subject to the limitations on distribution contained in § 117(b) and the requirement in § 117(a)(2) that they be destroyed once possession of the original is no longer rightful. Since § 117 is both the more specific and the later enacted provision, these limitations would prevail over the general language of § 109(a) under basic canons of statutory interpretation.

[458] 17 U.S.C. § 109(a).

[459] 1976 House Report, *supra* note 40, at 79 (1976).

[be outside the scope of Section 109(a)]."[460] A leading copyright treatise concludes that "on balance, it would seem that the literal text of Section 109(a) should be followed, so that its immunity may be claimed by any 'owner of a particular copy or phonorecord lawfully made,' and not just by those who acquired such ownership via a prior transfer from the copyright owner."[461]

Given our view that, in the typical situation,[462] the making of backup copies is probably a fair use, we see a risk to copyright owners under current law that those backup copies could then be distributed without legal consequence. We believe that outcome would be fundamentally unfair[463] and, notwithstanding the ambiguity of the 1976 House Report on this point, contrary to congressional intent. Nonetheless, we cannot overlook the possibility that a court would hold this way. When added into the balance, this element tips the scale in favor of statutory change.

We therefore recommend that Congress either (1) amend section 109(a) to ensure that fair use copies are not subject to the first sale doctrine; or (2) create a new archival exemption that provides expressly that backup copies may not be distributed. We express no preference as between the two options, and note that they are not mutually exclusive.

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[460] *Id.*

[461] Nimmer, *supra* note 21, at § 8.12[B][3][c].

[462] *See supra*, note 450.

[463] Apart from the obvious detrimental effect this outcome would have on the copyright owner's market, we note that the initial determination of fair use that permitted the making of the copy may have been premised on the fact that the copy was not made for distribution. *See infra*, note 468.

The first option would entail amending section 109(a) to state that only copies that have been lawfully made *and lawfully distributed* are subject to the first sale doctrine. We believe that this change would be consistent with what Congress intended in section 109.

As noted above, the text of section 109 does not refer to any previous transfer of a lawfully owned copy (although the condition that the person be an owner could be argued to presuppose a sale or other transfer of ownership from the copyright owner) and the 1976 House Report is ambiguous on the question whether a first sale must occur to trigger the application of section 109 to a particular copy. Section 109 was intended by Congress to "restate[] and confirm[]" a principle that had been "established by the court decisions and section 27" of the 1909 law. Section 27 refers not to "lawful copies" but to copies "the possession of which has been lawfully obtained." This language arguably requires a lawful sale or other distribution (otherwise the copy would be lawfully "made" not lawfully "obtained"q).[464] The seminal court decision on first sale, *Bobbs-Merrill Co. v. Straus*,[465] went even further, holding that the copyright owner parted with all right to control sale of a copy after it "had parted with the title to one who had acquired full dominion over it and had given a satisfactory price . . . ."[466] Given this chronology of the development of the first sale doctrine, it seems very unlikely that Congress intended a radical departure from the requirement of a "first sale" or other authorized distribution by the copyright owner. A likelier explanation for the particular wording in the statute is that it was drafted to avoid any potential conflict with the ability of a compulsory licensee's, or subsequent purchaser's, ability to sell phonorecords made under the section 115 compulsory license "to make and distribute phonorecords" of nondramatic musical works.[467]

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[464] *See Platt & Munk Co. v. Republic Graphics, Inc.*, 513 F.2d 847 (2d. Cir. 1963).

[465] 210 U.S. 339 (1908). The case is discussed *supra*, at 20.

[466] 210 U.S. at 350.

We note that this proposed change to section 109 would not preclude the distribution of copies made pursuant to section 107 in all cases, since (like all of the exclusive rights in section 106) the distribution right is subject to the fair use doctrine. It would, however, require that a separate fair use analysis be applied to the distribution of that particular copy. The fair use copy could be transferred only in those cases where the distribution itself qualified as a fair use.[468]

The second option entails creating a new exemption for making backups of lawful copies of material in digital form, and amending section 117 to delete references to archival copies.[469] The new exemption should follow the general contours of section 117 (a)(2) and (b), and include the following elements: It should permit the making of one or more backup copies of a work.

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[467] 1976 House Report, *supra* note 40, at 79 ("[A]ny resale of an illegally 'pirated' phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not."). Our proposal would also meet this concern since a phonorecord that is manufactured and sold under the section 115 license would be both lawfully made and lawfully distributed.

[468] In some cases, the making of a copy may be a fair use in large part because the copy is not disseminated to third parties. For example, in *Sony*, the Supreme Court held that it was a fair use for a private citizen to record a television program off-the-air for purposes of "time-shifting," which the Court described as "the practice of recording a program to view it once at a later time, and thereafter erasing it." 464 U.S. at 423. The personal nature of that use was critical to the Court's analysis. *See, e.g.*, 464 U.S. at 449 ("the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity"). The fact that the making of a personal copy for purposes of time-shifting (and with the anticipation of subsequent destruction of the copy) is fair use should not make it lawful subsequently to sell, rent or give that "lawfully made" copy to a third party.

[469] We recommend this approach in order to preserve section 117's present character as a computer program exemption and at the same time ensure that computer programs and other materials in digital form are subject to the same rules concerning the making of backup copies.

The copy from which the backup copies are made must be in digital form on a medium that is subject to accidental erasure, damage or destruction in the ordinary course of its use. It should stipulate that the copies may be made and used solely for archival purposes or for use in lieu of the original copy. It should also specify that, notwithstanding the provisions of section 109, the archival copy may not be transferred except as part of a lawful transfer of all rights in the work. Finally, it should specify that the archival copies may not be used in any manner in the event that continued possession of the work ceases to be rightful.

Permitting the making of multiple copies is necessary because prudent backup practice requires it. For example, a typical approach to backing up would entail making both on-site and off-site copies of the entire contents of a hard drive on a regular basis, in addition to making incremental backups of just those files on the hard drive that have changed.

The requirement that the work be stored in digital form on a medium that is subject to accidental erasure, damage or destruction in the ordinary course of its use is intended to avoid claims like that faced by the court in *Atari, Inc. v. J S & A Group, Inc.*,[470] without unduly limiting the exemption to current technology.[471] The exemption would also not be limited, as the *Atari* court suggested, to damage or destruction by electrical or mechanical failure. Media that are subject to accidental erasure by human error would qualify as well. Digital media that are subject to accidental destruction outside the ordinary course of use (e.g., by fire or other catastrophe), however, would not qualify, since there would no longer be a basis for treating them any differently from traditional hard-copy media for purposes of archiving.

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[470] 597 F. Supp. 5, 9-10 (N.D. Ill. 1983) (rejecting assertion that making of 'backup' copies of a videogame embodied in ROM is permitted under section 117 because ROM is not vulnerable to "damage by mechanical or electrical failure," court holds device for copying videogames in ROM not to have substantial noninfringing uses under *Sony* analysis of contributory infringement)

[471] Currently, the exception would be limited primarily to backups made from copies on a hard drive, floppy disk, or other magnetic medium.

The proposal that archival copies may be made and used solely for archival purposes or for use in lieu of the original copy is derived from section 117(a)(2). It has been modified in recognition of the fact that, in certain instances, the original copy is used as the backup, and the backup becomes the use copy.[472]

The requirement that archival copies not be transferable (except as part of a lawful transfer of all of the transferor's rights in the work) is derived from section 117(b). This takes care of the concern addressed above regarding the intersection of sections 107 and 109 in the context of backup copies.

The requirement that archival copies not be used in any manner in the event that continued possession of the work ceases to be rightful is a substitute for the requirement in section 117(a)(2) that any such backup copies be destroyed. Since backup copies frequently include many works on a single medium, and since erasure or destruction of individual files on such a medium is often impossible, the proposal would not require destruction. It would instead require that the archival copies not be used in any manner.

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[472] *See* Copyright Office, The Computer Software Rental Amendments Act of 1990: The Nonprofit Library Lending Exemption to the "Rental Right" 77-78 (1994).

4. Contract Preemption

Several commenters proposed that the Copyright Act should be amended to ensure that contractual provisions that override consumer privileges in the copyright law, or are otherwise unreasonable, are not enforceable.[473] In essence, this is a request to amend section 301 of the Copyright Act, which governs the scope of federal preemption of state law (including state contract law). Section 301 states that

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, . . . whether published or unpublished, are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

There appears to be consensus among courts that enforcement of contracts is not prohibited as a general matter.[474] However, there is disagreement among courts respecting the degree to which the Copyright Act may preclude the enforcement of specific contractual provisions that would otherwise be enforceable under state law. At least one court has taken a nearly categorical approach to contract preemption, holding that rights created by contract are not "rights equivalent to any of the exclusive rights within the general scope of copyright."

> Rights "equivalent to copyright" are rights established by law – rights that restrict the options of persons who are strangers to the author. . . . A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights."[475]

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[473] *See, e.g.*, C-DFC, at 4; T-Library Ass'ns, Neal, at 16; T-DiMA, Greenstein, at 239.

[474] *Architectronics, Inc. v. Control Systems, Inc.*, 935 F. Supp 425, 441 (S.D.N.Y. 1996); *see also Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1059 (C.D. Cal. 2000) (a majority of courts have found that breach of contract claims generally are not preempted).

[475] *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

Consequently, "a simple two-party contract . . . may be enforced."[476]

Other courts have found contract rights preempted to the extent that they essentially restate one or more of the exclusive rights under section 106 of the Copyright Act (e.g., reproduction) with no "extra element."[477] No case, however, has applied preemption broadly enough to nullify contractual provisions that vary or override exceptions and limitation in the Copyright Act.

Section 7 of the Boucher-Campbell bill would have amended section 301 to apply the broad scope of preemption of contract rights advocated by some of the commenters.[478] Unlike the proposals concerning the first sale doctrine and temporary copies, however, section 104 of the DMCA does not include any statutory reference that arguably brings this proposal within the scope of the Report. Consequently, we conclude that the issue of preemption of contractual provisions is outside the scope of the Report.

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[476] *Id.*

[477] *National Car Rental Sys. v. Computer Assocs. Int'l*, 991 F.2d 426, 433 (8th Cir. 1993); *Frontline Test Equip. v. Greenleaf Software, Inc.*, 10 F. Supp. 2d 583, 593 (W.D. Va. 1998).

[478]

SEC. 7. PREEMPTION.

Section 301(a) of title 17, United States Code, is amended by inserting the following at the end thereof:

"When a work is distributed to the public subject to non-negotiable license terms, such terms shall not be enforceable under the common law or statutes of any state to the extent that they–

"(1) limit the reproduction, adaptation, distribution, performance, or display, by means of transmission or otherwise, of material that is uncopyrightable under section 102(b) or otherwise; or

"(2) abrogate or restrict the limitations on exclusive rights specified in sections 107 through 114 and sections 117 and 118 of this title.".

H.R. 3048, 105th Cong., 1st Sess., § 7 (1997).

We do note, however, that the issue is complex and of increasing practical importance, and, as such, may be worthy of further consideration at some point in the future.[479] On one hand, copyright has long coexisted with contract law, providing a background of default provisions against which parties are generally free to order their own commercial dealings to suit their needs and the realities of the marketplace. On the other hand, movement at the state level toward resolving uncertainties that have existed about the enforceability of non-negotiated license agreements, coupled with legally-protected technological measures that give right holders the technical capability of imposing contractual provisions unilaterally, increases the likelihood that right holders, and not the copyright policies established by Congress, will determine the landscape of consumer privileges in the future. Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change.

5. Miscellaneous Additional Issues Beyond the Scope of the Report

a. *Impact of Section 1201 on Fair Use and other Copyright Exceptions*

Several commenters expressed general opposition to the prohibitions on circumvention of technological protection measures contained in 17 U.S.C. § 1201, and noted their concerns about the adverse impact that section 1201 may have on fair use and other copyright exceptions.[480] Given the express language of section 104, which requires an evaluation of the impact of, *inter alia*, section 1201 on the operation of two specific provisions of the copyright law – sections 109 and 117 – it seems unlikely that Congress intended this Report to delve into the general relationship between section 1201 and all of the other copyright exceptions and limitations. Moreover, the fact that Congress expressly directed us to evaluate this precise issue every three years as part of the rulemaking under section 1201(a)(1)(C), tends to support the conclusion that the impact of section 1201 on fair use and other copyright exceptions is outside the scope of this Report.

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[479] We note that in Australia the CLRC published an issues paper in June 2001 seeking information regarding the prevalence, effects and desirability of contracts that purport to override copyright exceptions granted under the *Copyright Act 1968*. In particular, the CLRC is investigating the extent to which such agreements occur in the online and offline environments and whether these agreements are and should be valid and enforceable. In all, the CLRC seeks views on nine issues. Details can be found on the CLRC website at www.law.gov.au/clrc.

b. *Impact of Section 1201 on Users of DVDs*

Several sets of comments were focused on the litigation[481] concerning software tools for circumventing the CSS that is used to encrypt motion pictures distributed on DVD.[482] Some of these comments offered a point-by-point rebuttal of the plaintiffs' case; others expressed concern that section 1201 had an adverse effect on users of DVDs by limiting the playback of DVD movies to devices that are licensed by the consortium holding the rights to the CSS technology.

Only the courts have the authority to determine the outcome of the *Reimerdes* case; our mandate is to evaluate the impact of section 1201 on the operation of sections 109 and 117.

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[480] *See, e.g.*, C-NARM/VSDA, at 37. *See generally* C-Fischer; C-Darr; C-Jones; C-Klosowski; C-Love.

[481] *See supra*, note 89.

[482] *See, e.g.*, C-Arromdee; C-Thau and Taylor.

Although some of the comments tried to recast the DeCSS controversy as a first sale issue,[483] this effort reflected a misconception of the nature of the first sale doctrine.[484]

Apart from the foregoing issue, the general questions concerning the relationship between section 1201 and users of DVDs are outside the scope of this Report.

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[483] *See, e.g.*, C-LXNY, at 1.

[484] *See supra*, at 74.

Appendix 1

DEPARTMENT OF LABOR

Employment and Training Administration

Solicitation for Grant Applications (SGA) Work Incentive Grants

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice; Technical Assistance/Bidders' Conferences.

SUMMARY: The Employment and Training Administration published a document in the **Federal Register** of May 25, 2000, concerning the availability of grant funds designed to enhance the employability, employment and career advancement of people with disabilities through enhanced service delivery in the new One-Stop delivery system established under the Workforce Investment Act of 1998.

FOR FURTHER INFORMATION CONTACT: B. Jai Johnson, Grants Management Specialist, Division of Federal Assistance, Fax (202) 219–8739. Technical assistance/bidders' conferences will be held regarding the Department's Solicitation for Grant Application (SGA) for Work Incentive Grants at the following times and places:

June 6: 1 p.m. to 5 p.m.—Pierson Auditorium, University of Missouri at Kansas City, 5000 Holmes Avenue, Kansas City, Missouri 64110 (816) 235–1758. Contact for this location is Kelli Ellerbusch.

June 8: 9 a.m. to 1 p.m.—Oakland Federal Building, 1301 Clay St., Oakland, California 94612. Contact for this location is Chris Neilson at (510) 628–0665.

June 15: 9 a.m. to 1 p.m.—U.S. Department of Labor Auditorium, 200 Constitution Ave., N.W. 20210. Contact at this location is Paul Bennett at (202) 693–4937.

Specific information related to the SGA can be obtained from the following homepage: *http://wdsc.org/disability*. For general information on the technical assistance/bidders' conferences, please contact Paul Bennett at (202) 693–4927 or via e-mail at bennett-paul@dol.gov. Please contact Mr. Bennett to identify any special needs required at the technical assistance conference you plan to attend. If you are traveling from out of town, you will need to make hotel reservations on your own.

Signed at Washington, DC, this 25th day of May, 2000.

Laura Cesario,

Grant Officer.

[FR Doc. 00–14005 Filed 6–2–00; 8:45 am]

BILLING CODE 4510–30–U

LIBRARY OF CONGRESS

The United States Copyright Office

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 000522150–0150–01]

RIN 0660–ZA13

Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

AGENCIES: The United States Copyright Office, Library of Congress; and the National Telecommunications and Information Administration, United States Department of Commerce.

ACTION: Request for public comment.

SUMMARY: The United States Copyright Office and the National Telecommunications and Information Administration invite interested parties to submit comments on the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, ("DMCA") and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections.

Section 104 of the DMCA directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to submit to the Congress no later than 24 months after the date of enactment a report evaluating the effects of the amendments made by title 1 of the Act and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections. This **Federal Register** Notice is intended to solicit comments from interested parties.

DATES: Comments must be received by August 4, 2000. Reply comments must be received by September 5, 2000.

ADDRESSES: The Copyright Office and the National Telecommunications and Information Administration invite the public to submit written comments in electronic form by electronic mail or on diskette. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing.

Comments submitted by electronic mail should be sent to both 104study@loc.gov and 104study@ntia.doc.gov. E-mail comments should be submitted as file attachments in one of the formats specified under **SUPPLEMENTARY INFORMATION** and should be sent to both the Copyright Office and National Telecommunications and Information Administration addresses.

Comments sent by regular mail may be sent to Jesse M. Feder, Policy Planning Advisor, Office of Policy and International Affairs, U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024; and Jeffrey E.M. Joyner, Senior Counsel, Office of Chief Counsel, National Telecommunications and Information Administration (NTIA), Room 4713, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. Paper submissions should include a version on diskette in one of the formats specified under **SUPPLEMENTARY INFORMATION**. Comments should be sent to both the Copyright Office and National Telecommunications and Information Administration addresses.

FOR FURTHER INFORMATION CONTACT: Jesse M. Feder, Office of Policy and International Affairs, U.S. Copyright Office, Library of Congress (202) 707–8350 and Jeffrey E.M. Joyner, National Telecommunications and Information Administration (202) 482–1816.

SUPPLEMENTARY INFORMATION:

File Formats and Required Information

Comments and reply comments may be submitted in electronic form, in one of the following formats:

1. If by electronic mail: Send to "104study@loc.gov" and "104study@ntia.doc.gov" a message containing the name of the person making the submission, his or her title and organization (if the submission is on behalf of an organization), mailing address, telephone number, telefax number (if any) and e-mail address. The message should also identify the document clearly as either a comment or reply comment. The document itself must be sent as a MIME attachment, and must be in a single file in either: (1) Adobe Portable Document File (PDF) format (preferred); (2) Microsoft Word Version 7.0 or earlier; (3) WordPerfect 7 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

2. If by regular mail or hand delivery: Send, to the appropriate address listed above, two copies of the comment, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission and, if applicable, his or her title and organization.

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Either the document itself or a cover letter must also include the name of the person making the submission, his or her title and organization (if the submission is on behalf of an organization), mailing address, telephone number, telefax number (if any) and e-mail address (if any). The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format (preferred); (2) Microsoft Word Version 7.0 or earlier; (3) WordPerfect Version 7 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

3. If by print only: Anyone who is unable to submit a comment in electronic form should submit an original and two paper copies by hand or by mail to the appropriate address listed above. It may not be feasible for the Copyright Office and the National Telecommunications and Information Administration to place these comments on their respective websites.

Background

On October 28, 1998, the Digital Millennium Copyright Act ("DMCA") was enacted into law (Pub. L. No. 105–304, 112 Stat. 2860). Section 104 of the DMCA directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to submit to the Congress no later than 24 months after the date of enactment a report evaluating the effects of the amendments made by title 1 of the Act and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections. This **Federal Register** Notice is intended to solicit comments from interested parties on those issues.

The objective of title I of the DMCA was to revise U.S. law to comply with two World Intellectual Property Organization (WIPO) Treaties that were concluded in 1996 and to strengthen protection for copyrighted works in electronic formats. The DMCA establishes prohibitions on the act of circumventing technological measures that effectively control access to a work protected under the U.S. Copyright Act, and the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, component or part thereof which is primarily designed or produced to circumvent a technological measure that effectively controls access to or unauthorized copying of a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures. The DMCA also makes it illegal for a person to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof which is primarily designed or produced to circumvent a technological measure that effectively protects a right of a copyright owner in a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures. In addition the DMCA prohibits, among other actions, intentional removal or alteration of copyright management information and knowing addition of false copyright management information if these acts are done with intent to induce, enable, facilitate or conceal a copyright infringement. Each prohibition is subject to a number of statutory exceptions.

Section 109 of the Copyright Act, 17 U.S.C. 109, permits the owner of a particular copy or phonorecord lawfully made under title 17 to sell or otherwise dispose of possession of that copy or phonorecord without the authority of the copyright owner, notwithstanding the copyright owner's exclusive right of distribution under 17 U.S.C. 106(3). Commonly referred to as the "first sale doctrine," this provision permits such activities as the sale of used books. The first sale doctrine is subject to limitations that permit a copyright owner to prevent the unauthorized commercial rental of computer programs and sound recordings.

Section 117 of the Copyright Act, 17 U.S.C. 117, permits the owner of a copy of a computer program to make a copy or adaptation of the program for archival purposes or as an essential step in the utilization of the program in conjunction with a machine. In addition, pursuant to an amendment contained in title III of the DMCA, section 117 permits the owner or lessee of a machine to make a temporary copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes of maintenance or repair of that machine.

Specific Questions

The United States Copyright Office and the National Telecommunications and Information Administration of the United States Department of Commerce seek comment on the following specific questions. Parties need not address all questions, but are encouraged to respond to those for which they have particular knowledge or information.

1. Section 109

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

1. Section 117

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

2. General

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

Information collected from responses to this **Federal Register** Notice will be considered when preparing the required report for Congress.

Dated: May 16, 2000.

Marybeth Peters,

Register of Copyrights, United States Copyright Office.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 00–14001 Filed 6–2–00; 8:45 am]

BILLING CODE 1410–30–P

NUCLEAR REGULATORY COMMISSION

Notice of Availability; NUREG–1700, "Standard Review Plan for Evaluating for Nuclear Power Reactor License Termination Plans"

The U.S. Nuclear Regulatory Commission is noticing issuance of NUREG–1700, "Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans." The standard review plan (SRP) guides staff reviewers on performing safety reviews of license termination plans (LTPs). Although the SRP is intended to be used by the NRC staff in conducting reviews, it can be used by interested parties responsible for conducting their own licensing review or developing an LTP. The principal purpose of the SRP is to ensure the quality and uniformity of staff reviews and to present a well-defined base from which to evaluate the requirements. It is also the purpose of the SRP to make the information about regulatory matters widely available to improve the understanding of the staff's review process by interested members of the public and the nuclear industry.

For further details with respect to this action, the documents are available for inspection at the NRC's Public Electronic Room at *http://www.nrc.gov.*

Dated at Rockville, Maryland, this 11th day of May 2000.

For the Nuclear Regulatory Commission.

Robert A. Nelson,

Acting Chief, Decommissioning Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 00–13949 Filed 6–2–00; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27179]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

May 26, 2000.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by June 19, 2000, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After June 19, 2000, the applicant(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Alliant Energy Corporation, et al. (70–9323)

Alliant Energy Corporation ("Alliant"), a registered holding company, its wholly owned intermediate nonutility holding company, Alliant Energy Resources, Inc. ("AER"), both located at 222 West Washington Avenue, Madison, Wisconsin 53703, and AER's nonutility subsidiary, Heartland Properties, Inc. ("HPI" and together with Alliant and AER, "Applicants"), 122 West Washington Avenue, 6th Floor, Madison, Wisconsin 53703, have filed an post-effective amendment, under section 9(c)(3) of the Act and rule 54 under the Act, to an application previously filed under the Act.

Under the terms of an order dated April 14, 1998 (HCAR No. 26856) ("1998 Order"), Alliant is currently authorized to hold passive investments, through HPI, in low-income housing projects ("LIHTC Properties").[1] Under the terms of the 1998 Order, HPI indirectly owns a 1% general partnership interest in an investment fund, more particularly described below, that indirectly holds limited partnership interests in seventeen LIHTC Properties ("Fund Properties"), nine of which are located outside the Alliant service territory. In addition to the investments permitted in the 1998 Order, Applicants are authorized by order dated August 13, 1999 (HCAR No. 27060) to invest up to $50 million ("Investment Limitation") from time to time over a five-year period to acquire additional LIHTC Properties in the Alliant Energy service territory.

The investment fund, Heartland Properties Equity Investment Fund I ("Fund"), is a limited partnership that holds limited partnership interests ranging between 88.9% and 99% in several other limited partnerships that own the Fund Properties. HPI's 1% general partnership interest in the Fund is held by its wholly owned subsidiary, Heartland Fund I, Inc. Minnesota Life Insurance Company ("MLIC") is the sole limited partner in the Fund with a 99% limited partnership interest.

HPI has been approached by MLIC about the possibility of selling its limited partnership interest in the Fund to HPI. In order to consummate the transaction, Applicants now propose to modify the existing limitation on investments in LIHTC Properties located outside of the year's service territory, for the specific purpose of acquiring MLIC's limited partnership interest in the Fund. The expected purchase price of approximately $10.7 million, when combined with HPI'S current investment level in LIHTC Properties, will be within the Investment Limitation.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–13953 Filed 6–2–00; 8:45 am]

BILLING CODE 8010–01–M

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[1] The Commission determined in the 1998 Order that HPI's interests in 84 LIHTC Properties were retainable under section 9(c)(3) of the Act, because the interests were acquired to generate tax credits under section 42 of the Internal Revenue Code and they were being converted into passive investments.

Appendix 2

Appendix 2

Index of Initial Comments
Filed in Response to 65 FR 35673

(In the order they were received by the Copyright Office)

1	Ray Van De Walker
2	Claus Fischer
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7	Computer Professionals for Social Responsibility
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9	Digital Future Coalition
10	Walter Charles Becktel
11	John M. Zulauf
12	Software & Information Industry Association
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16	Mickey McGown
17	Bryan W. Taylor
18	American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association
19	Computer & Communications Industry Association
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21	Digital Media Association
22	Home Recording Rights Coalition
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24	Future of Music Coalition
25	LXNY
26	American Film Marketing Association, Association of American Publishers, Business Software Alliance, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America
27	National Association of Recording Merchandisers, Inc. and Video Software Dealers Association, Inc.
28	Interactive Digital Software Association
29	Time Warner Inc.
30	Ronald C.F. Antony

Appendix 3

Appendix 3

Index of Reply Comments
Filed in Response to 65 FR 35673

(In the order they were received by the Copyright Office)

1	Michael A. Rolenz
2	Digital Commerce Coalition
3	Time Warner, Inc.
4	Walter Charles Becktel
5	Reed Elsevier, Inc.
6	American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America
7	Paul Fenimore
8	American Library Association American Association of Law Libraries Association of Research Libraries Medical Library Association Special Libraries Association
9	Software & Information Industry Association
10	Michael (Mickey) McGown
11	American Society of Composers, Authors and Publishers (ASCAP)
12	Bryan Taylor
13	Broadcast Music, Inc. (BMI)
14	Arnold G. Reinhold
15	National Music Publishers' Association
16	Digital Media Association

Appendix 4

their study topics for 2000 and for Leslie Kramerich, the acting Assistant Secretary for the Pension and Welfare Benefits Administration, to update members on employee benefits legislative and regulatory activities. Departing members also will be awarded certificates of appreciation.

Members of the public are encouraged to file a written statement pertaining to topics the Council studied for the year by submitting 20 copies on or before November 6, 2000 to Sharon Morrissey, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite 5677, 200 Constitution Avenue, NW., Washington, DC 20210.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 219–8753. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by November 6 at the address indicated.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before November 6, 2000.

Signed at Washington, DC this 19th day of October 2000.

Leslie Kramerich,

Acting Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 00–27262 Filed 10–23–00; 8:45 am]

BILLING CODE 4510–29–M

LIBRARY OF CONGRESS

Copyright Office

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 000522150–0287–02]

RIN No. 0660–ZA13

Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

AGENCIES: The United States Copyright Office, Library of Congress; and the National Telecommunications and Information Administration, United States Department of Commerce.

ACTION: Notice of public hearing.

SUMMARY: The United States Copyright Office and the National Telecommunications and Information Administration announce a public hearing on the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, ("DMCA") and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections.

DATES: The public hearing will be held in Washington, DC on Wednesday, November 29, 2000, from 9:30 a.m. to 5 p.m. Requests to testify must be received by the Copyright Office and the National Telecommunications and Information Administration by 5:00 p.m. E.S.T. on November 24, 2000, and accompanied by a one page summary of the intended testimony.

ADDRESSES: The public hearing will be held at the Library of Congress, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20540, Room LM–414. Any member of the public wishing to attend and requiring special services, such as sign language interpretation or other ancillary aids, should contact the Library of Congress or the National Telecommunications and Information Administration at least five (5) working days prior to the hearing by telephone or electronic mail at the respective contact points listed immediately below.

FOR FURTHER INFORMATION CONTACT: Jesse M. Feder or Marla Poor, Office of Policy and International Affairs, U.S. Copyright Office, Library of Congress (202) 707–8350; or Jeffrey E.M. Joyner, National Telecommunications and Information Administration (202) 482–1816. E-mail inquiries regarding the hearings may be sent to *jfed@loc.gov*, *mpoor@loc.gov*, or *jjoyner@ntia.doc.gov*.

SUPPLEMENTARY INFORMATION: On June 5, 2000, the Copyright Office and the National Telecommunications and Information Administration published a Notice of Inquiry seeking comments in connection with the effects of the amendments made by title 1 of the DMCA and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections. 65 FR 35673 (June 5, 2000). That **Federal Register** Notice was intended to solicit comments from interested parties on those issues. For a more complete statement of the background and purpose of the inquiry, please see the Notice of Inquiry which is available on the Copyright Office's website at: http://www.loc.gov/copyright/fedreg/65fr35673.html.

In response to the Notice of Inquiry, the Copyright Office and the National Telecommunications and Information Administration received 30 initial written comments and 16 replies (to the initial comments) that conformed to the requirements set forth in the Notice of Inquiry. The comments and replies have been posted on the Office's website; see *http://www.loc.gov/copyright/reports/studies/dmca/comments/* and *http://www.loc.gov/copyright/reports/studies/dmca/reply/*, respectively.

Requirements for persons desiring to testify: A request to testify must be submitted in writing to the Copyright Office and to the National Telecommunications and Information Administration. All requests to testify must include:

- The name of the person desiring to testify;
- The organization or organizations represented by that person, if any;
- Contact information (address, telephone, and e-mail); and
- A one page summary of the intended testimony.

This request may be submitted in electronic form. The Copyright Office and the National Telecommunications and Information Administration will notify all persons wishing to testify of the expected time of their appearance, and the maximum time allowed for their testimony.

All requests to testify must be received by 5 E.S.T. on November 24, 2000.

Time limits on testimony at public hearings: There will be time limits on the testimony allowed for speakers. The time limits will depend on the number of persons wishing to testify. Approximately one week prior to the hearings, the Copyright Office and the National Telecommunications and Information Administration will notify all persons submitting requests to testify of the precise time limits that will be imposed on oral testimony. Due to the time constraints, the Copyright Office and the National Telecommunications and Information Administration encourage parties with similar interests to select a single spokesperson to testify.

File Formats: Requests to testify may be submitted in electronic form in one of the following formats:

1. If by electronic mail: Send to "104study@loc.gov" and "104study@ntia.doc.gov" a message containing the name of the person

BEST COPY AVAILABLE

requesting to testify, his or her title and organization (if the submission is on behalf of an organization), mailing address, telephone number, telefax number (if any) and e-mail address. The message should also identify the document clearly as a request to testify. The one page summary of the intended testimony must be sent as a MIME attachment, and must be in a single file in either: (1) Microsoft Word Version 7.0 or earlier; (2) WordPerfect 7 or earlier; (3) Rich Text File (RTF) format; or (4) ASCII text file format.

2. If by regular mail or hand delivery: Send to Jesse M. Feder, Policy Planning Advisor, Office of Policy and International Affairs, U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024; and to Jeffrey E.M. Joyner, Senior Counsel, Office of Chief Counsel, National Telecommunications and Information Administration (NTIA), Room 4713, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Please include two copies of the one page summary of the intended testimony, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission and, if applicable, his or her title and organization. Either the document itself or a cover letter must also identify the document clearly as a request to testify and include the name of the person making the submission, his or her title and organization (if the submission is on behalf of an organization), mailing address, telephone number, telefax number (if any) and e-mail address (if any). The document itself must be in a single file in either (1) Microsoft Word Version 7.0 or earlier; (2) WordPerfect Version 7 or earlier; (3) Rich Text File (RTF) format; or (4) ASCII text file format.

Background: On October 28, 1998, the DMCA was enacted into law (Pub. L. No. 105–304, 112 Stat. 2860). Section 104 of the DMCA directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to submit to the Congress no later than 24 months after the date of enactment a report evaluating the effects of the amendments made by title 1 of the Act and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections.

The objective of title I of the DMCA was to revise U.S. law to comply with two World Intellectual Property Organization (WIPO) Treaties that were concluded in 1996 and to strengthen protection for copyrighted works in electronic formats. The DMCA establishes prohibitions on the act of circumventing technological measures that effectively control access to a work protected under the U.S. Copyright Act, and the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, component or part thereof which is primarily designed or produced to circumvent a technological measure that effectively controls access to or unauthorized copying of a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures. The DMCA also makes it illegal for a person to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof which is primarily designed or produced to circumvent a technological measure that effectively protects a right of a copyright owner in a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures. In addition the DMCA prohibits, among other actions, intentional removal or alteration of copyright management information and knowing addition of false copyright management information if these acts are done with intent to induce, enable, facilitate or conceal a copyright infringement. Each prohibition is subject to a number of statutory exceptions.

Section 109 of the Copyright Act, 17 U.S.C. 109, permits the owner of a particular copy or phonorecord lawfully made under title 17 to sell or otherwise dispose of possession of that copy or phonorecord without the authority of the copyright owner, notwithstanding the copyright owner's exclusive right of distribution under 17 U.S.C. 106(3). Commonly referred to as the "first sale doctrine," this provision permits such activities as the sale of used books. The first sale doctrine is subject to limitations that permit a copyright owner to prevent the unauthorized commercial rental of computer programs and sound recordings.

Section 117 of the Copyright Act, 17 U.S.C. 117, permits the owner of a copy of a computer program to make a copy or adaptation of the program for archival purposes or as an essential step in the utilization of the program in conjunction with a machine. In addition, pursuant to an amendment contained in title III of the DMCA, section 117 permits the owner or lessee of a machine to make a temporary copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes of maintenance or repair of that machine.

Specific Questions: The principal purpose of the hearing is to inquire into points made in the written comments submitted in this proceeding, and not to raise new issues for the first time. Specifically, the public hearing will (and therefore the one page summary of intended testimony must) focus on the following questions:

- What are the policy justifications for or against an amendment to Section 109 to include digital transmissions, and what specific facts can you provide to support your position? What problems would an amendment to Section 109 address? What problems would an amendment to Section 109 not address? What problems would an amendment to Section 109 create? What problems would be averted by leaving this section unchanged? What would be the likely impact on authors and other copyright owners of an amendment to Section 109 modeled on Section 4 of H.R. 3048, 105th Cong., 1st Sess. (1997), and what is the basis for your assessment?
- Please explain in detail the impact an amendment to Section 109 to include digital transmissions would have on the following activities of libraries with respect to works in digital form: (1) Interlibrary lending; (2) use of works outside the physical confines of a library; (3) preservation and (4) receipt and use of donated materials. To what extent would an amendment to section 109 fail to have an impact on these activities? Please explain whether and how these activities should and can be accommodated by means other than amendment of Section 109?
- What are the policy justifications for or against an exemption to permit the making of temporary digital copies of works that are incidental to the operation of a device in the course of a lawful use of a work, and what specific facts can you provide to support how such an exemption could further or hinder electronic commerce and Internet growth? What problems would it address and what problems would a broad exemption not address? What problems would such an exemption create? How would your assessment differ if an exemption were limited to

temporary digital copies of works that are incidental to the operation of a device in the course of an authorized use of the work?

- What are the policy justifications for or against an expansion to the archival copy exception in section 117 to cover works other than computer programs, and what specific facts can you provide to support for your view? Would such an expansion of section 117 further or hinder electronic commerce and Internet growth? What problems would such a statutory change address and not address? What problems would such an expansion create?
- What are the policy justifications for or against expressly limiting the archival copy exception in section 117 to cover only those copies that are susceptible to destruction or damage by mechanical or electrical failure? What problems would such a statutory change address and not address? What problems would such a change create?

Marybeth Peters,

Register of Copyrights, United States Copyright Office.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 00–27293 Filed 10–23–00; 8:45 am]

BILLING CODE 1410–30–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Notice of Solicitation of Public Interest

AGENCY: Executive Office of the President, Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP).

ACTION: Notice of solicitation of public interest.

SUMMARY: OFPP is developing a new initiative to fundamentally examine the manner by which the Government develops and applies incentives to its contractual vehicles, and is seeking information and advice that would advance this effort.

COMMENTS DUE DATE: Comments and information regarding the proposed initiative must be received on or before December 26, 2000.

FOR FURTHER INFORMATION CONTACT: Comments and information should be sent to Stanley Kaufman, Deputy Associate Administrator, OMB, OFPP, 725 17th Street NW., Washington, DC 20503. He can be reached electronically at *skaufman@omb.eop.gov* or by phone at 202–395–6810.

SUPPLEMENTARY INFORMATION:

I. Background

Procurement reform initiatives such as the Federal Acquisition Streamlining Act of 1994, the Federal Acquisition Reform Act of 1996, the Information Technology Management Reform Act of 1996, and Performance-Based Service Contracting are significantly changing the way the Government acquires supplies and services, moving from a process-oriented, rules-based, risk avoidance culture to one emphasizing performance outcomes, business judgment, streamlined procedures, and risk management.

The rules-based culture constrained contracting officials' flexibility to serve as business advisors focusing on the overall business arrangements. While the cited acquisition reforms provided contracting officers increased flexibilities in negotiations and communication with contractors, research by the Army and studies by OFPP and industry found that innovative contracting methods are being used insufficiently, and effective incentives exist which are not being considered.

Consideration of incentives typically was limited to the fee portion of contracts to the detriment of other incentives that contractors would find more appropriate and meaningful, such as a consistent revenue flow and the promise of future business. In addition, incentives too often focused on the process of the work to be performed vs. the outcomes, thereby rewarding unnecessary and/or even counterproductive behavior. Furthermore, profit is not an effective incentive for non-profit entities such as universities and research laboratories. As a result, contractors often did not provide their best solutions and Government requirements were not fulfilled in as timely, quality-related, and cost-effective manner as possible.

II. The Project

OFPP is looking to develop a new contracting paradigm that will encourage acquisition officials to develop joint objectives with contractors and effectively incentivize both parties to create "win/win" business arrangements.

In pursuing this project, OFPP would like to pull together any experiences and literature regarding non-fee type incentives. Consultation with the private, non-profit, and public sectors is hereby sought. A review of current policy, regulatory and statutory guidance will be conducted to determine any barriers to achieving the project's objective and the need for any additional guidance to facilitate compliance.

Accordingly, OFPP is seeking ideas, recommendations, practices, lessons learned, etc. on what works in industry, the non-profit environment, and state and local governments. Such information tailored to specific industries (e.g., manufacturing, services, construction), subsets of industries (e.g., information technology, advisory and assistance services, environmental remediation), types of contractors (e.g., universities, small businesses) and types of endeavors (e.g., research and development) would be welcomed. We also would welcome any studies or literature that analyzes, assesses, or validates these practices, as well as information on relevant training courses and materials.

In examining this information and developing any policy initiative, we will consider approaches that would fundamentally restructure our contractual relationships to accommodate improving our business arrangements, and so would welcome any appropriate recommendations as well as the identification of any impediments (legal, regulatory or policy). OFPP welcomes written comments and materials, and is willing to meet with individual companies, associations, and other organizations to hear their views and recommendations. OFPP is concurrently surveying Federal agencies to ascertain any ongoing innovative practices that could be used in this initiative.

We are also considering a public meeting to facilitate the exchange of information between the Government and general public to explore this issue if sufficient interest exists. Topics could include: developing alternative incentive strategies; providing recommendations; sharing best practices and lessons learned; reviewing existing literature; and identifying barriers and potential benefits and disadvantages for both agencies and contractors. Expressions of interest in such a meeting would be appreciated.

Kenneth J. Oscar,

Acting Deputy Administrator.

[FR Doc. 00–27117 Filed 10–23–00; 8:45 am]

BILLING CODE 3110–01–P

Appendix 5

Appendix 5

Joint Study on 17 U.S.C. Sections 109 and 117
Required Pursuant to DMCA Section 104

Public Hearing
November 29, 2000

Schedule of Witnesses

9:30-9:45 Introduction
- Hon. Marybeth Peters, Register of Copyrights
- Hon. Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information

9:45-11:00 Panel 1
- James Neal and Rodney Peterson
  - American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association
- Allan Adler
  - Association of American Publishers
- Bernard Sorkin
  - Time Warner Inc.
- Fritz Attaway
  - Motion Picture Association of America

11:00-12:30 Panel 2
- Keith Kupferschmidt
  - Software and Information Industry Association
- Lee Hollaar
- Scott Moskowitz
  - Blue Spike, Inc.
- Emery Simon
  - Business Software Alliance
- Nic Garnett
  - Intertrust Technologies Corporation

12:30-1:45 Lunch Break

1:45-3:10 Panel 3
- Susan Mann
  - National Music Publishers' Association, Inc.
- Marvin Berenson
  - Broadcast Music Inc.
- Gary Klein
  - Home Recording Rights Coalition
- Pamela Horovitz
  - National Association of Recording Merchandisers

John T. Mitchell (for Crossan Andersen)
Video Software Dealers Association

3:10-4:35 Panel 4
Professor Peter Jaszi
Digital Future Coalition
Seth Greenstein
Digital Media Association
Steven J. Metalitz
American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Association of America, National Music Publishers' Association, and Recording Industry Association of America
Daniel Duncan
Digital Commerce Coalition
Carol Kunze
Red Hat, Inc.

4:35-6:00 Panel 5
Cary Sherman
Recording Industry Association of America, Inc.
David Goldberg
Launch Media, Inc.
David Beal
Sputnik7.com
David Pakman
myPlay Inc.
Bob Ohweiler
MusicMatch Inc.
Alex Alben
RealNetworks, Inc.
Robert Nelson (for Charles Jennings)
Supertracks, Inc.

Appendix 6

Appendix 6

Initial Comments
Filed in Response to 65 FR 35673

1	Ray Van De Walker
2	Claus Fischer
3	Roger R. Darr
4	Dusty Jones
5	Przemek Klosowski
6	Michael L. Love
7	Computer Professionals for Social Responsibility
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9	Digital Future Coalition
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30	Ronald C.F. Antony

Ray Van De Walker

This is a comment in regard to the effects of the Digital Millenium Copyright Act on the first sale doctrine, by Ray Van De Walker

>(e) To what extent, if any, is the first sale doctrine related to,
>or premised on, particular media or methods of distribution?

Copying provides less public benefit than ever before. Formerly, a publisher had to recoup the risks and costs of printing presses, physical transport, and warehousing. Guaranteeing a publisher an income by means of a copyright license was an equitable return on these risks. In return, purchasers got a tangible object, one difficult to reproduce.

The cost to copy a digital work is less than in any previous media.
When private copying is cheaper than licensed copying, clearly distributors no longer provide public benefit by copying. At the same time the value of the media no longer justifies the first sale doctrine. Clearly the value is now in the art, editing, and archiving, not the copying or media.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

The correct model is now to rent rights to the work, not sell the media. Artists have always rented rights to publishers. Now everyone can publish, so everyone should rent rights.

Recording the rental contract has to be made very cheap, but the government, the guarantor of all contracts, can establish standards for recording digital contracts.
An important issue is that people should be able to buy and sell contracts.
Another is that people should be able to keep contracts in their own private devices.
Verifying such contracts should be something that any playback device should be able to do, by some automated means.
I think designing such a system would be very easy for a good cryptographer.
The government could just put out an RFP.

Now I have a scheme to enforce these contracts (forgive me- I love to invent things).

The regulatory agencies can -require- play-back devices to nag or display advertising when a valid contract is not present- periodically (5 minutes would be very annoying, yet not interfere with excerpting).
Advertising permits all fair uses and generates income for artists. Nagging permits fair uses, and can be placed in even the simplest legitimate open-source software to comply with the regulations.
The artistic work itself can be in clear, and copied and viewed by public-domain programs.
It is simply required to have an identifying tag.

Automatic nagging is like publisher's access to manuscripts. The form is inconvenient, but the content is available for evaluation. Nagging also need not degrade the quality of presentation.

Absence of a nag feature would be evidence of an intent to steal.
Publishing nagless playback software would be conspiracy to commit theft.
That is, these would be prosecutable, which satisfies me as a copyright owner...
Also, in the misty future, when the media is obsolete, the public-domain players would still exist.

The DMCA, or something like it, would then be about falsifying digital contracts or identification tags. That is, fraud.

A) What effect has the DMCA had on the first sale doctrine?

It contributed to the destruction of equity between seller and buyer.

Books, records and movies are traditionally published in clear. It seems obvious that distributors have a public duty to make their media both usable, and long-lived.

When media are in clear, consumers, libraries and other conservors can copy them, giving them an indefinite useful life. This is how all ancient literature survived into modern times. In clear text.

Most copyright-based industries now plan to encrypt digital works, specifically to prevent consumers from copying them into more modern formats.
This violates customary usage. It prevents numerous fair uses, including excerption, parody, and archiving.

DMCA -eliminates- any lawful possibility of circumventing these encryptions, and maintaining customary fair use rights.

b) What effect has the DMCA had on the operation of the first sale doctrine?

Of course, the DMCA was an attempt to strengthen first sale rights by protecting the value of artistic works.

It failed (see above) because it attempts to force value to inhere in the media.
Value actually inheres in the work itself, not the media.
Now interested parties are escalating the resulting conflict.

So, I no longer feel protected by the law, but rather oppressed by it.
I am a professional computer programmer. I personally make a living from copyright law.

In the recent DeCSS case, civil and criminal actions were brought against computer programmers for the metaphorical equivalent of opening the hood of a car, taking apart the engine, and making tools to fix the engine so it works the way engines always worked before...

The cross-posting of DeCSS, and the creation of anonymous internet file-replication software are clear acts of civil disobedience to retain customary reverse-engineering and fair use rights.

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To: LIBRARY OF CONGRESS
The United States Copyright Office

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

Comments on the Digital Millenium Copyright Act (DMCA)

The DMCA shifts the line between lawful and unlawful behaviour from copyright (the act of copying a protected work) deeply into engineering (the act of constructing, analyzing, reconstructing, improving, extending, or otherwise manipulating devices and algorithms that can be used in access control).

Many engineers probably feel that while this legislation has been enacted with much good will, it has not sufficiently considered the impact on the disciplines of engineering in general, and software and encryption in particular. DMCA is written as if there were access control measures as a separate entity, entirely disconnected from other types of technology.

As a professional engineer, I am not able to see such a clear line of distinction. The area of algorithms is vast, and many single computer algorithms and methods could potentially be used in access control devices. DMCA allows any interested party to use such a method in access control devices, thereby potentially drawing use, research, publication, etc. of the method out of legality. While this statement may seem exaggerated, I have yet to meet the person who can draw a clear line between an `access control device' and a generally usable computer method. I think that none can be established, and attempts to do so are misguided and will result in a very unclear situation that harms the engineering disciplines.

DMCA fails to put an obligation on the creators of access control devices to ensure that the devices serve only their primary purpose, before putting them under this special protection. It is questionable whether access control devices can be constructed with today's technology which have exactly the right scope. In the absence of well designed devices, DMCA should not protect access control devices beyond their primary use. Specifically, DMCA should not allow access control devices to act as a single point of entrance to a technology, thereby creating an artificially privileged group of technology providers in the market.

Society needs to find a way to resolve the questions of copyright in the digital age without a proxy war carried out in the engineering fields. That avoids the basic discussion about the right notion of property and about proper use of copyrighted materials.

Opinions stated above are strictly mine. In no way do I represent or speak for my employer, and I do not know my employer's positions on the subject.

Claus Fischer
Sr. CAD Engineer
Intel Corporation

Roger R. Darr

I wish to respond primarily to question 2, regarding other general areas of concern with respect to the DMCA requirements under consideration, although many of my concerns do relate indirectly to the first set of questions regarding Section 109.

My concern is that the DMCA, and its underlying assumptions, are broadening the definition and scope of copyright to the point that it is a direct threat to the rights of citizens to communicate freely with one another, as guaranteed by the First Amendment of the United States Constitution. More specifically, I will argue that the DMCA is in fact attempting to grant and protect rights to pure information, rather than a specific embodiment thereof, and that such a right or guarantee is both technically impossible, and dangerous to our traditionally protected freedoms.

First, I will address the issue of protecting a specific embodiment of information, or pure information regardless of embodiment. Its my understanding that prior to the computer age, legislation has always prudently confined copyright protection to a specific embodiment of information, recognizing that the number of forms which pure information may assume is practically unlimited, and any attempt to protect all of them would be both futile and counterproductive. Now that computers have given ordinary citizens the power to format shift, transform, duplicate, and communicate pure information quickly and easily, certain traditional markets based on the less widely available means of manufacturing specific embodiments (protected by copyright) are now perceived to be threatened, and recent developments in copyright law, especially the DMCA, appear to be an attempt to protect this traditional market from the perceived "threat" created by this improved capacity of citizens to communicate. One of the ways the DMCA seeks to accomplish this is by making a whole class of technology illegal (the anti-circumvention clause.)

Regardless of tradition and reason, actual practice on the Net even today, and even before the enactment of DMCA was that corporations producing specific embodiments of information are using a liberal interpretation of copyright, combined with effective legal intimidation, to deny individual citizens their cherished right to communicate freely. Even clear cases of fair use, such as quoting or sampling a portion of a larger work for purposes of comment, are being squashed through the simple expedient of sending frivolous cease-and-desist letters to those who attempt to exercise this right. Clearly, something must be done to protect the rights of citizens to make non-commercial use of information from copyrighted sources, much of which has become part of American culture.

I believe the fundamental ambiguity which has created the legal morass which exists today can be traced back to a misunderstanding of the basic reasons for which copyright exists. Copyright does not exist to enrich the holders of copyrights. Copyright does not exist to guaranty a monopoly to a specific industry or distribution format. The purpose of copyright is, in service of the public interest, to encourage more information to be published in forms which are accessible to the public. It was a law conceived at a time when the most effective physical medium for information distribution was a book, which is a medium which required substantial investment to create. Therefore, to encourage the production of books, it was expedient for the People to grant a limited protection to the authors and/or publishers of specific works. Recognizing that copyright, if not carefully limited, presented a danger to the far more important natural right to freedom of expression, the law was subject to a variety of limitations. These limitations to copyright made it possible, among other things, for public libraries to exist.

A library is a important concept, and one which any revisions to copyright law must consider and protect. Libraries have had a fundamental role in our nation's education and entertainment for generations. By using a library, citizens have had the right and the ability to access thousands of copyrighted works at no charge, whether the holders of the copyrights wished them to do so or not. Perhaps the publishers occasionally lamented the fact that the availability of their books in libraries could reduce the bookstore sales of their product, but the ability of the public to freely access information was considered more valuable than increasing the monetary profits of a few specific companies.

Unfortunately, that priority seems to have been lost recently. Since the advent of the personal computer, a dangerous double-shift in the interpretation of copyright seems to have taken place, with many negative consequences for our civilization. First, the emphasis of copyright law and enforcement seems to have shifted away from the public good, and towards the perceived financial interest of publishing companies. And second, in a very unfortunate response to the ability of computers to easily duplicate and transform information from one format into another, copyright law seems to have made the fateful leap from protecting an embodiment, to attempting to protect the underlying information itself.

As evidence of this, I would cite the popular practice of exchanging MP3 sound files over the internet. These files, when traversing the internet, are pure information. When they are stored on someone's hard drive, the format and capacity of the drive, and the location and encoding of the information vary greatly from one user to the next. In fact, even when the MP3 file was created using a copyrighted source embodiment such as a CD, the compression process renders the actual sequence of bits in the file completely different from those of the source material. One can even say that the only practical similarity between the MP3 sequence flying around on the internet, and its original copyrighted source embodiment, is that they produce very similar sound information when played with appropriate decoder technology. And yet the companies which assert copyright over the original CD embodiment tend, almost without exception, to attempt to assert copyright over the underlying information, as well as any and every transformation thereof.

A few simple thought experiments will indicate the futility of attempting to control pure digital information, as opposed to a specific embodiment. First off, every digital file can be mathematically represented by a single finite counting number. One who asserts copyright over a digital file is literally claiming ownership of a number. This in and of itself raises questions, but it gets worse. It is a mathematical fact that any counting number can be transformed into any other counting number by an appropriate sequence of operations. Furthermore, the number of algorithms, or sequences of operations, which can transform any given number into another given number is infinite. Therefore if the law were to seek to protect pure information rather than a specific embodiment, then in order the law to pass the most elementary tests of logic, a single copyright holder must be given rights over ALL counting numbers (since algorithms exist to transform any number into the protected information) or a single copyright holder must be given control of ALL algorithms, since an infinite number of algorithms exist which can transform a non-protected number into a protected one.

At first glance, the reader may be tempted to dismiss this entire line of reasoning as being overly abstract, and bearing little resemblance to practical reality. But these are fundamental facts about digital information, and market economies are very efficient about discovering such fundamentals and exploiting them. In fact, we can already see a foreshadowing of our possible Orwellian future in the DVD player market. The Motion Picture Association of America (MPAA) fully recognized the facts outlined in the previous paragraph, and so insisted upon controlling not only the physical embodiment of their "copyrighted information," but the player used to transform it into intelligible video and audio information as well. Now, when we buy a DVD player, we have to pay for the device, but the device does not work for us, nor does it recognize our interests or rights. Our DVD players work for the MPAA, and have a number of unnecessary features designed to deprive us of our rights to fair use, such as making personal archival VHS copies of movies we own, or buying a DVD from the location of our choosing.

I consider it extremely tragic that the United States Congress, rather than acting against such monopolistic distribution cartels to restore the legitimate rights of U.S. citizens, has on the contrary made it illegal for customers to thwart or circumvent these abusive uses of technology.

The current trend in copyright law may also constitute a threat to our right to privacy as well. Since a digital file may be transformed (or encrypted) into another digital file, recognizing rights over pure information will give copyright holders an incentive to attempt to invade the privacy of citizens, especially those attempting to communicate privately with one another, on the grounds that "violations" or "infringements" may be occurring. It is perfectly foreseeable that they will eventually, if the current trend is allowed to continue, stoop to lobbying the government to routinely monitor and spy upon its own citizens in order to prevent the transmission of "unlicensed" information. These are all terrible and frightening prospects, but the United States, by enacting the DMCA, has already chosen a road which leads directly and inevitably to this outcome. This trend must be reversed immediately if we are to continue to live in a free country.

I believe the following actions would be prudent :

1. Confine copyright protection to specific embodiments, not pure information.

2. Recognize that the internet only transports information, and in order for a significant violation of any reasonable rights to occur, someone must create and sell an embodiment in competition with the original copyright holder.

Dusty Jones

Comments regarding the Digital Millennium Copyright Act (DMCA)

Generally speaking the DMCA has done more to hamper progress and rights of US citizens than it has done to help. Corporations, i.e. RIAA (Recording Industry Association of America) and the MPAA (Motion Picture Association of America), have generated lawsuits against various people at an unbelievable rate. Quite often, disputes are quickly resolved in the CORPORATIONS favor by scare tactics. The most overused is the "Cease and Desist" letter written to the website's ISP.

Websites are taken down and unfairly muted without due process. This is entirely unfair but is not the only abuse of the DMCA.

Other abuses include the infamous DeCSS [MPAA vs. 2600] case. The DVD Consortium has labeled CSS (content scrambling system) as a access circumvention technology when in fact it is simply used for regional coding allowing the publishers of DVD content to extract as much as possible from the varying markets. DVD's purchased in ASIA will not work in players purchased in the US.

Under the corporations interpretation of the DMCA, circumventing this access control technology would be illegal, despite the long standing tradition of reverse engineering. If the DeCSS technology is circumvented by reverse engineering DeCSS using longstanding reverse engineering practices allowing for competing technology then this should be legal.

Think of where the PC market if reverse engineering was illegal. The modern PC bios was reversed engineered from IBM by Compaq paving the way for cheap compatible personal computers. Without reverse engineering of the PC bios we would be deadlocked to an IBM PC monopoly.

I am concerned that the DMCA has shifted the balance of power away from the consumer and left it unfairly leveraged by the Corporation. The corporations consider there to be no "FAIR USE" allowable. If I wanted to quote from a DVD, something totally legal under fair use, I would need to circumvent the CSS system to get at the underlying data. This tactic is now made illegal under the DMCA.

Thank you.

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Przemek Klosowski

Comments on the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, (``DMCA'') and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections.

I am opposed to prohibiting the circumvention of technical means of securing copyrighted material. The copyright is a legal protection for intellectual property that should stand on its own; the technical means of enforcing copyright should not be protected in any special way because there are already sanctions for those who violate copyrights regardless of technical means of protection.

The copyright protection of intellectual property (IP) has been conceived to serve the public good; the fact that it offers significant advantages to the producers of IP is only a mechanism for achieving the progress in the arts, science and industry. Consequently, the constitution requires that the copyright law has to balance the rights of producers and consumers. Traditionally, this balance has been guaranteed by 'fair use exceptions', rights guaranteed by 17 USC 109 and 114, time-shifting, right to quote copyrighted material for scholarly purposes, etc.

The commercial interests began already using DMCA to expand their control over distribution, seeking to destroy the freedoms and rights that are firmly established in the law of the land and in the minds of the consumers. In particular, the rights guaranteed by the 'first sale doctrine', as well as rights to administer the system (backup, copying, etc) are just some examples of the liberties that are taken away.

I reiterate: the anti-circumvention rule does not protect IP---it is already protected by the previous law. Instead, DMCA protects the control of delivery of IP. For instance, the content brokers can prevent the consumer from fast-forwarding over commercial advertisements included in the IP that the consumer purchased.

The fair use rights have always been under attack by the cartel of large content brokers. They do not directly refuse us these rights, of course: instead, they began to exploit the anti-circumvention provisions of DMCA by inventing inept protection systems, whose only purpose is to establish a straw-man copyright protection system, and accuse those who point out weaknesses in these systems of violations of anti-circumvention provisions.

There is a provision of DMCA that states that the fair use exceptions are not supposed to be impinged by any other provisions of the act. This is in direct contradiction to the anti-circumvention provisions, which are being actively prosecuted by the content brokers (e.g. in the DeCSS case), in the hope of practically preventing the exercise of fair use rights.

I protest this backdoor usurpation of unprecedented control of copyrighted material by large content broker corporations. It is contrary to the intended role of copyright in promoting original contributions by protecting the authors' rights. Strict enforcement of anti-circumvention rules does little good for authors' or consumers'

BEST COPY AVAILABLE

rights; it only provides unjustifiable control to the large content broker corporations.

Przemek Klosowski, Ph.D.

Michael L. Love

Comment on the Copyright Office's Notice of Inqurity

I am opposed to DMCA because it undermines fair use, reverse engineering, and other rights.
Moreover, the proponents of this "anti-freedom" law are selfishly concerned only with their monetary interests, which are protected at the expense of others rights under DMCA.

Finally, it is inappроprate for the Copyright Office to protect these greedy interests at the expense of our vital reverse engineering, research, security, fair use and other rights. In doing so, the Copyright Office would be implicitly accepting the proponents position of content control and undue exclusivity. This would result in irreparable harm to innovation and original research. Is it not the purpose of copyright law to protect these vital interests, which are common to all of us? Please, do not sell out american rights to the highest bidder.

Sincerely,
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Computer Professionals for Social Responsibility

Report to Congress Pursuant to Section 104 of the Digital Millenium Copyright Act

Comments to the Copyright Office

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These are comments responding in particular to these specific questions relating to Section 109:

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?
(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?
(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

There are digital materials are not transmitted digitally, such as digitally recorded music on CD, or digitally stored film in DVD format on CD. While these materials are digital, they are fixed in a package that can be resold or loaned without the making of further copies. In this sense, these digital materials follow the traditional "hard copy" format that we are familiar with in terms of applying the first sale doctrine. In these comments I will address the question of digital materials that are transmitted digitally as part of the distribution of copyrighted works.

Digital materials that are transmitted digitally are not placed in a fixed container by the manufacturer or producer or publisher of the item. These materials are transmitted as computer files to a device owned or used by the consumer. There is no physical package that contains the copyrighted work. Digital materials of this type are especially vulnerable to copying because they must be delivered as a computer file of a type that can be received and stored by the operating system of the consumer's device. Any file stored on a general-purpose computer can be copied by simply transferring the exact sequence of digital bits to another place on that computer's hard drive or to another storage device.

Because it is nearly always possible to make a copy of these digitally transmitted materials, the controls put in place by the producers are controls on *access* or *use*, not on copying. These access controls, although focused on copying, have an effect on first sale rights for digital materials.

Access Controls

There are four primary ways that digitally transmitted materials are received, and these correspond to different access controls:

1) *Materials transmitted to a standard Web browser*. Because the Web browser is today a ubiquitous means of receiving viewable files, many works are prepared to be viewed on standard browsers. In the case of works that are openly available on the World Wide Web

and for which no access controls are in place, these are sent in one or more segments using open standard formats such as HTML or PDF. Where access controls are in place they generally consist of two forms, which can be used separately or together:

a) *Access limitations based on Internet address or password.* When the members of an institution such as a university are eligible to access materials, their eligibility is determined by their location on the Internet, which is governed by that institution. For individual access (i.e. that not mediated by an institution), access is usually controlled by a password. Once the materials have been transmitted to the web browser, however, the copyright owner has no means of controlling the disposition of the materials. The received files can be copied and they can be transmitted to others.

b) *Access limitations controlled by the server.* For electronic books or online databases it is possible to send only limited portions of a document or file at a time, such as an individual page or a small number of database records. At no time is the entire copyrighted work available to the user for copying or transmitting to others. Although there are no direct limitations on copying or printing of the transmitted portions, the inconvenience of doing so is similar to that with hard copy materials.

2) *Materials transmitted to a generalized computer as a file*. In this case, the entire copyrighted work or a portion of the copyrighted work (i.e. one chapter) is transmitted. The file can be in a commonly used computer format, but for purposes of access control it may use a computer format that includes access control.

3) *Materials transmitted to a generalized computer as a stream*. Some computer formats such as RealAudio or RealVideo[1] do not send an entire file over the network to the receiving computer but send only small portions of the file which correspond to those sections currently being viewed or played. The receiving computer is never in possession of more than a small segment of the file at any time. The serving computer and the viewing software constantly control the amount of file that is resident on the receiving computer.

4) *Materials transmitted to a specialized device*. The example of this kind of device is an e-book reader, a combination of computer hardware and software that has been developed expressly to receive, store and display electronic books. This type of device can facilitate access controls and can prevent some functions such as transmitting copies to others or connecting to printers.

Different access controls are available to different customers. For example, the types labeled 1 and 3 above are feasible only in situations where users have a constant connection to the network. In areas where that connection is not available, other methods such as 2 and 4 above must be used. Each of these will use different access controls and the effect of these controls in relation to the first sale doctrine will differ.

In the analysis below, I express my own understanding of a number of access control methodologies used in commercially available products. My analysis is based on my reading of the documentation of these products and descriptions of standards, as well as some casual use of some of the products themselves. In the event that I have misunderstood any of these technologies I invite those more familiar with them to provide any corrections to my statements.

Access Controls and First Sale Doctrine

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[1] RealNetworks, http://www.real.com

> "... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." Title 17, 109 (a)

In evaluating access controls and the first sale doctrine, I take the key portion of the copyright law to be the above quote, especially the phrase: *without the authority of the copyright owner.* To evaluate this I must give some technical details of current and planned access controls. In this area I will refer again to the four types of transmittal, above, and relate these to first sale.

Materials transmitted to a standard Web browser

Materials delivered to a web browser generally depend on that browser for display or play (in the case of multimedia files) of the content. Many materials that are delivered to a standard web browser contain no access or copy controls. These materials are assumed to be protected by the copyright law, because they are fixed in their expression, but the authors have chosen to make them available without controls. There is no question that these materials can be disposed of as stated in the first sale doctrine.

Access controls can be applied to works available over public networks and directed to a general-purpose Web browser. For example, controls can be applied limiting access to those users with a certain the Internet address[2]. Because internet addresses are assigned in ranges to institutions, this type of control implements a contract that limits use to requests from the local network of that institution. This is commonly used for access contracts with universities and libraries to limit access to their legitimate members. Access can also be granted to individuals using a password that allows the user to view licensed materials. This type of access control does not include any ongoing control of the digital items once they are received on the customer's computer.

For many content providers, however, this type of control is not acceptable because it still leaves the delivered content susceptible to copying. In other words, once the content is delivered to the user it is outside of the control of the provider or copyright owner. Such content can be copied at will and transferred to other computer users. Additional controls are therefore often set in place that limit the amount of the work that is delivered to the user at any given time. This type of control is realistically effective only for large works (like electronic books) or for works where users logically retrieve sections or portions of the overall item, such as encyclopedias and databases. These controls are exercised by the software that sends the content to the user's computer and consists of limiting the amount of content that is delivered at any one time. For example, netLibrary, a digital e-book company that delivers content to the user's desktop, has no controls over copying or printing but delivers only one page to the user at a time[3]. Database vendors also commonly rely on this type of control although it may be less obvious to users: databases deliver only the portion of their file that responds to a particular query, and often limit the total number of entries that can be delivered per query. They may also have limitations on displays, such as allowing only a small number of entries to be displayed at a time. Even though these controls have technical justifications such as limiting the amount of system resources dedicated to individual searches, they also serve to limit the amount of data that a user has in his possession at any given time.

These controls deter unauthorized copying by making copying inconvenient, but they also make it unlikely that the user will exercise first sale rights because of the burden of doing so. If a user does put forth the effort, however, and does dispose of the copy in a way related to first sale, then this is indeed *without the authority of the copyright owner.*

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[2] cf. Testimony of David Mirchin, Silver Platter Information, Copyright Office Hearings on Anticircumvention Measures, May 2, 2000.
http://www.loc.gov/copyright/1201/hearings/index.html#transcripts

[3] http://www.netlibrary.com

Materials transmitted to a generalized computer as a file

This is the situation that many users characterize as a "file download." The file may or may not be displayed on the screen at the time of delivery, but the entire file is delivered to the user's computer device and is stored on that device. This type of file is highly susceptible to copying because the entire file is delivered in a machine-readable format.

Many of the downloadable files on the Internet are executable programs. These programs can require a license number or customer ID that the user must key in before installing or using the program. Access controls on other types of downloaded files today are rare, but this may become more commonplace through the use of newly-developed technologies. One example of this kind of technology is Adobe's PDF with "Web Buy."[4]

The Adobe corporation has developed and promotes a digital document format called "Portable Document Format," or PDF. One of the purposes of PDF is to produce an online document that has the same look and structure as a printed document, and so it is commonly used to deliver documents as a single file much as they are delivered as a single "unit" in hard copy. Documents presented in PDF are entire articles or reports or even entire books. Adobe provides the reader program for these files, which must be installed on the user's machine, for free. To accommodate access controls for eCommerce, the Adobe PDF Reader version 4.05 includes functions called "Web Buy" and "Adobe PDF Merchant." As stated in their document of September, 1999:

> "The publisher then encrypts the PDF file using Adobe PDF Merchant software and generates the unique encryption key that unlocks the document, ensuring that only authorized users are able to view the document." (p.2)

The unlocking mechanism is contained in a small file that must accompany the file containing the protected content. When the user attempts to open the content file for reading, that file interacts with the "key" file to determine if the conditions have been met for access to be allowed. This key can be based on one or more access control mechanisms, including identifiers for individual computers or storage devices (e.g. hard drives or removable drives), the user's network login name, or time factors.

> "... Once [the customer] finds the book at the online book retailer's Web site, the customer clicks on the button to purchase the book. She is shown a dialog box requesting unique identifying information from her computer. Once she gives permission to the online retailer to access this information, the retailer automatically verifies the CPU ID, user ID (login name), and storage device ID." (p.3)

The identifiers that are related to the CPU (central processor unit, that is the main computer chip) and the storage device ID (fixed disk, network disk or removable disk) are ones that are inextricably linked to that device and cannot be changed or altered by the consumer. That the intention is to limit access to a particular device is clear in this statement:

> "The seller determines what set of computing environment variables are to be requested from the buyer, who then has the option of sending all, none, or some portion of those variables. If the seller does not deem the returned variables sufficient to lock the

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[4] http://www.adobe.com/products/acrobat/webbuy/main.html

> document to the buyer's computing environment, the reseller can decline to sell the content to the buyer." (p.6)

This also means that the file cannot be accessed on other devices, so that if it is transferred to a different device the key will not allow the content file to be opened for viewing. In this sense, any access control that limits access to a single device is likely to interfere with the right to exercise the first sale doctrine because no first sale rights are available to the buyer of the content unless the actual device is also transferred. In the case of files that require a password or key but that are not limited to a particular device, the original buyer can transfer the file along with the key and exercise first sale rights, although this is often forbidden by the license agreement for the product.

Materials transmitted to a generalized computer as a stream

Streaming audio and video techniques have been developed by a small number of software companies to allow a broadcast-like experience over the Internet. Streaming techniques can be used for stored multimedia files, such as audio-video files of past conference events, or for live broadcasts. Live broadcasts, by definition, are not available in a computer file format and may or may not be considered "fixed" for the purposes of copyright, so I will address only those works that are stored on the server for later access. These files are analogous to sound recordings and movies on tape, with the difference that they are delivered digitally over networks at the time of play.

Streaming came about ostensibly because for large files (as is true for most video and for some high quality audio) it has been impractical to download the entire file for viewing. (Note that with the size of currently available hard drives, this rationale for streaming is less convincing than it was just a few years ago when these techniques were first employed.) In streaming technology, only a small segment of the file is transmitted at a time and temporarily stored on the hard drive. As the play of the content progresses, previously played portions are automatically deleted from the hard drive and new portions are downloaded in advance of playing.[5]

Because the entire file is never in the possession of the customer, there is no application of the first sale doctrine for these files.[6]

Materials transmitted to a specialized device

The devices that I will discuss in this section may be implemented in hardware, in software, or in a combination of the two. Specialized electronic book readers are one example of this type of device.[7] There are also readers that are realized in software that contains similar controls.[8]

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[5] Streaming technology has sophisticated algorithms that determine how much advance storage is needed on the hard drive to facilitate uninterrupted play. This depends on the speed of the user's Internet connection as well as on other factors. So the amount of a file that is on a user's hard drive at any given time can vary.

[6] Streamed files can be downloaded as whole files using techniques that are available to users of Internet browsers but which may not be obvious to many users. It requires users to remove the browser plug-in that plays the streamed work and adjusting browser settings so that files of this type will be saved to disk. Whether or not using this technique falls under the anticircumvention language of the DMCA is beyond the scope of this report.

[7] Examples of these are: 1) Rocketbook http://www.rocketbook.com 2) Everybook, http://www.everybook.net

[8] Examples are: 1) Glassbook reader http://www.glassbook.com 2) TK3 http://www.nightkitchen.com

To facilitate the growth of the electronic book industry, at least two sets of standards for access control have been developed to date. An industry consortium called the Electronic Book Exchange Working Group has created the Electronic Book eXchange (EBX) standard.[9] A second standard has been issued as the XrML Specifications for Digital Rights Management[10]. Each of these has controls that have a potential effect on first sale rights.

EBX

The EBX standard has features particularly designed to facilitate lending (first sale) and fair use. Included in the "rights" that are enforced by the software that follows this standards are:

- Lendable (with Lending Timeout which controls the lending period)
- Givable
- Sellable
- Personal Use Copies (maximum number)
- Personal Use time (combines with Personal Use Copies, i.e. 2 copies per year)
- Personal Use Copy Size (i.e. paragraph, page, chapter, whole).

Of these rights, those particular to First Sale are included in an element called "Basic rights:"

> "The basic rights define whether the owner has the right to give, lend and/or sell copies of the voucher."[11]

The "voucher" mentioned above is the file that contains the rights information that is enforced by the rights software. It is the transfer of the voucher that allows access to the protected work.

Note that the standard permits these rights to be included in the contract that accompanies an electronic book purchase but does not require or imply that such rights be turned "on." So, for example, when the Stephen King novella *Riding the Bullet* was made available over the Internet, it came from at least one vendor with the following control set:

> "Copy: No text selections can be copied from this book to the clipboard.
> Print: No printing is permitted for this book.
> Lend: This book cannot be lent to someone else.
> Give: This book cannot be given to someone else."

It is possible that the Lending right will not be the default for items purchased by individuals but will be primarily permitted for institutions like libraries and schools whose contract is specifically designed for use by multiple individuals.

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[9] The EBX working group lists these organizations among its developers: Adobe Systems, Book Industry Study Group, Coalition for Networked Information, Compaq, Glassbook, HarperCollins, Houghton Mifflin Company, Hewlett Packard, Hitachi, Ingram Lightning Print, J-Stream, Microsoft, RSA Labs. Softbook Press, Philips Electronics, Xerox. http://www.ebxwg.org

[10] XrML stands for Extensible rights Markup Language and is based on XML, eXtensible Markup Language which is a general purpose technique for creating data formats. XrML is based on the Digital Property Rights Language (DPRL) that was developed by Mark Stefik at Xerox PARC in 1996. http://www.xrml.com

[11] *EBX System Specification.* Draft 0.5. May 24, 1999. P. 28.

[12] Reported in an e-mail message on CNI-COPYRIGHT discussion list, March 24, 2000. http://www.cni.org/Hforums/cni-copyright/2000-01/0764.html. The message did not indicate if other rights were involved nor if one could ascertain defaults for rights not included here.

Given that the rights of lending, giving and selling of the work are conferred on the buyer by the copyright owner (or middle agent), it seems obvious that this access control technology does not allow the user to dispose of the item *without the authority of the copyright owner.*

XrML

XrML can be described as a more sophisticated standard than EBX in that it has additional features and controls. In the XrML standard, each "right" can be given complex controls of time, fees and incentives. The standard allows metered charges for "play" of works ("play" includes display of text), monetary incentives (per use or metered charges can change based on various factors), and expiration times. Exercise of the options that include fees would necessarily require the user to interact over a network with a point of sale in order to exchange a fee for the use or access.

The rights themselves are also highly complex and are divided into the categories of Transport Rights, Render Rights, Derivative Work Rights, File Management Rights, Configuration Rights. The rights most obviously related to the first sale doctrine are Transfer and Loan, which are categories of Transport Rights.

> "Transport rights govern the creation and movement of persistent copies of a work under the control of trusted repositories. There are three distinct kinds of transport rights: copy, transfer and loan. The interpretation of these rights are similar to familiar operations on physical works: copying an audio tape, transferring (or giving someone) a book, or loaning a compact disc."[13]

There are also rights for Delete and Uninstall that have to do with the disposition of the work by the recipient of a copy. Each of these rights can have conditions relating to time periods, use patterns or limitations, and can have fees associated with them.[14]

In addition, each of these rights can have "next rights." Next rights are those which will be applied when the item is transferred to the next user. The intention of next rights seems mainly intended to distinguish the rights of distributors, such as retailers, from the rights of end users, but could potentially be applied to any license.

> "When a digital work is copied, transferred, or loaned, certain rights become available on the receiving repository. Exactly which rights are available is determined by an optional NextCopyRights specification."[15]

Assuming that the software and hardware that implements an XrML license is working properly, the end user has no right to dispose of the possession of the copyright work *without the authority of the copyright owner.*

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[13] *XrML: Extensible rights Markup Language.* Version 1.0, April 25, 2000. p. 30

[14] The XrML standard itself warns against the use of fees in some of these circumstances. The standard itself would permit the creation of an access control that required payment for the deletion of a file. This would allow an unscrupulous entity to offer a file for free download and then require payment for the user to remove the file from her own hard drive. This points to the need for something that is outside the scope of the XrML standard, and that is clarity of license terms and the development of some consumer protection measures.

[15] *XrML: Extensible rights Markup Language,* op cit., p. 31.

Is the First Sale Doctrine Applicable to Digitally Transmitted Works?

I believe to have shown above that access controls on digitally transmitted works can interfere with the user's right related to the first sale doctrine. The question is whether this is a necessary result of access controls in general or if it is a characteristic of this generation of controls and something that might be overcome in the future. For a control to exist that would allow for first sale, it would need to have some particular characteristics: it would have to encapsulate the work in such a way that the access control is transferred with the work and still maintains its efficacy; it would have to allow transfer without allowing the creation of an additional copy; and it would have to do all of this without requesting authorization from the copyright owner, either at the time of purchase or at the time of disposition.

I cannot say whether such a system of access control could be developed in the future. I do know that the access control systems in development today are not of this type and, although the companies that support them generally are aware of the need to support first sale rights, they are unable to do so because the technology they use maintains control over the reader's right to dispose of the work.

There are other conclusions that I can draw from my reading in this area. One is that the rights of readers, which are poorly understood in the hardcopy world, may be many times more complex when digital rights management systems are applied. Another is that users may be unaware of the rights prior to purchase, and even then may have to exercise diligence to determine their rights once they have obtained the document. [16]

When we rely on copyright law for readers' rights, the law pertains to broad classes of works and the same law applies to all individual items of intellectual property within that class. With digital rights management technology, each work and each sale of each work can carry a vastly different set of rights. So the question becomes not only whether users have first sale rights, but whether they are aware of their rights and know how to exercise them. I have not been able to address this question here, and it may be too early in the life cycle of digital rights management systems and their uses to ascertain this, but hope that the question is answered in the future.

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[16] The person who posted the e-mail (see 12, above) relating to the rights in the version of the Stephen King novella stated that she had to click through three levels of menu items to see the rights, but that these rights were not displayed at any time during the purchase or download process.

Bob Beard

I am making my comments as both a computer programmer and a user of copyrighted material.

I strongly oppose the additional limits on the fair use of copyright material introduced with DMCA. I believe that the pendulum has swung too far in the interest of the copyright holders and has begun to trample the needs and rights of the copyright users.

I can forsee a significant problem with the "technological circumvention of copyright protection" clause of DMCA. The following five items come immediately to mind:

1. This will limit how the copyright material may be used to what is envisioned by the copyright holder. New and creative uses of the copyrighted material will be stifled.

2. There will be a fear of working with the copyright material lest you run afoul of what some company's legal department believes to be a technological circumvention or what some future court decision decides is a technological circumvention.

3. You can become bound up in the economic fortunes of the copyright holder. If the copyright holder falls on hard times, your access to the copyright material may not stay current with the rest of the industry. Worse yet, if the copyright holder should fail or become uninterested in the copyrighted material, you may no longer have any access to the material and you will not be able to get a third party to "unlock" the material for you.

4. Adding locks to copyright material that are "secret" may comprimise the functionality of a product that uses the copyrighted material. For example, say you have designed a product that navigates a vehicle. This vehicle uses a Global Positioning System (GPS) database that has some form of copyright protection. Since you have no visibility into the way the copyright protection is implemented, you can never be sure that an access to that database may be deemed a copyright violation. This could be devastating if the vehicle is navigating city streets and this problem occurs.

5. You may be forced to pay for the same copyrighted material again. This could happen if there was a technological improvement, or just another way to access the copyright material. You would not be able to adapt the copyrighted material to this new form yourself.

It seems to me that all copyright law "improvements" since 1950 have been instituted by lobbying efforts of corporations. All such lobbying efforts seem aimed at keeping a corporation's market position, slowing technological progress so that the corporation can attempt to catch up with some of their more forward looking competition, and attempting to have copyright users pay multiple times for essentially the same copyrighted material. This is obviously a case of "if you aren't winning the game, change the rules".

It is obvious to me that this is unbalancing copyright laws in favor of copyright holders. As a computer programmer, I have benefited economically from this. As a member of society, I have been robbed of many of my rights and been held back in the pursuit of knowledge.

Copyright law should be based on the ideal that there should be a free and unhindered exchange of ideas and expression between people. Knowledge is what makes a society "grow". Each generation gains from the knowledge it creates mixed with the knowledge that it has gained from previous generations. Copyright springs from the recognition that some people will add to society's knowledge base freely, without asking for anything in return. Others will do so only if they can profit from it. We, as a society, grant this latter group of people a limited amount of time where they may profit from their work in exchange for the work being added to the society's knowledge pool and the ability to add on to that work. In other words, "use" that knowledge.

Copyright law should never be used as a weapon against people. I feel that

many of the
laws that are being enacted surrounding intellectual property are doing just

that.
We seem to be trying to lock intellectual property up as tightly as we possibly can.
We shouldn't be doing that. We should be doing just the opposite.

Thank you for your consideration of my opinions.

Bob Beard
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Digital Future Coalition

Comments of the
DIGITAL FUTURE COALITION
submitted to the
U.S. Copyright Office
and
National Telecommunications and Information Administration, U.S. Department of Commerce
in response to the Request for Comments published at 65 Fed. Reg. 35673
pursuant to Sec. 104 of the Digital Millennium Copyright Act

The Digital Future Coalition ("DFC") consists of 42 national organizations (a list of which is attached to these comments) representing a wide range of for-profit and non-profit entities. Our membership includes educators, computer and telecommunications industry associations, libraries, artists, software and hardware producers, archivists, and scientists. DFC member organizations represent both owners and users of copyrighted materials.

Over time, our constituents have benefitted — as have other American individuals, companies and non-profit entities — from the maintenance of a balanced copyright system in the United States. Such a system is one that provides both strong protection for proprietors' rights and clear recognition of consumers' interests in access to protected materials. Thus, the DFC is strongly committed to the preservation and modernization, in the digital environment, of the limitations and exceptions that have traditionally been part of the fabric of U.S. copyright law.. It is our common conviction that a balanced copyright system is essential to secure the public benefits of both prosperous information commerce, on the one hand, and a robust shared culture, on the other.

In particular, from its inception in 1995, the DFC has advocated the updating of the so-called "first sale" doctrine, currently codified in 17 U.S.C. Sec. 109, as part of any comprehensive effort to bring copyright into the new era of networked digital communications. In the 105th Congress, for example, the DFC strongly supported H.R. 3048, legislation to implement the WIPO Copyright Treaty and Performances and Phonograms Treaty, which specifically provided that:

> Section 109 of title 17, United States Code, is amended by adding the following new subsection at the end thereof:
>
> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

We were concerned and disappointed that the final text of the Digital Millennium Copyright Act of 1998 ("DMCA") contained no similar provision, and — by the same token — pleased that Sec. 104 of that Act directed the Copyright Office and NTIA to undertake further study on the topic of "first sale" in the digital environment, along with that of the Sec. 117 exemptions.

The ultimate Constitutional goal of our copyright system is a public one — "To Promote the Progress of science and Useful Arts." Historically, the "first sale" doctrine has contributed to the achievement of that goal by providing a means for the broad secondary dissemination of works of imagination and information. That the public has reaped a wide range of benefits from the "first sale" doctrine becomes clear from even a cursory examination of the range of various cultural and commercial institutions this rule has supported and enabled -- everything from great research libraries to second-hand bookstores to neighborhood video rental stores. More broadly still, the doctrine has been an engine of free social and cultural discourse, permitting significant texts to be passed from hand to hand within existing or developing reading communities. In the current round of discussions over the future of "first sale," the DFC's primary concern is that a "default rule" -- restricting possession and use of copies embodying texts, images and other copyrighted works to the first purchaser or authorized recipient of such materials -- would retard rather than advance the progress of knowledge.

Our immediate concern about the future of the "first sale" doctrine in the new electronic world stems from comments included in the 1995 White Paper on Intellectual Property and the National Information Infrastructure (at 93-94) suggesting that the doctrine should be inapplicable, as a matter of conventional copyright doctrine, to electronic retransmissions by consumers of material originally received (by way of gift or purchase) over digital networks. Although this interpretation had not (and, to date, has not) been judicially tested, it is sufficiently plausible to suggest that even before the enactment of the DMCA, "first sale" was a doctrine at risk. The DFC's commitment (already noted) to balance in copyright law reform led us to propose that as proprietors' rights were updated in new legislation, "first sale" should be as well.

After the enactment of the DMCA, however, "first sale" proved to be in greater jeopardy than before. Specifically, whatever aspects of the doctrine might otherwise have survived and flourished in the digital environment now are threatened by the copyright owners' use of the "anti-circumvention" measures for which new Sec. 1201 of Title 17 provides legal sanction and support. The copyright industries are publicly committed to the implementation of what they term "second-level" access controls -- i.e. technological measures that control not only how a consumer first acquires a copy of a digital file, but what subsequent uses he or she may of it, and on what terms. *See, e.g.,* Joint Reply Comments of the American Film Marketing Ass'n et al., U.S. Copyright Office Rulemaking on Exemptions from Prohibitions on Circumvention of Technological Measures that Control Access to Copyrighted Works, Docket No. 99-7 (www.loc.gov/copyright/1201/comments/reply/112metalitz.pdf). Although such controls are in their infancy, they clearly have the potential to erase any remaining vestiges of "first sale" in current law, where the digital environment is concerned. Under fundamental copyright law principles, for example, the purchaser of downloaded digital text file downloaded to a portable storage medium (such as floppy disk or hand-held "e-book") apparently is permitted to transfer ownership of that "copy." But a simple password system or encryption device could be used to frustrate this consumer privilege, and attempts to override that anti-circumvention measure would potentially trigger severe penalties under the new Chapter 12 provisions.

Of course, the DFC is not privy to the plans and intentions of the content industries in this regard. The current study, however, is in a position to request information from publishing, motion picture, music and other related business about their business plans for the future implementation of "second level" access controls.

In the same connection, we would note that the Sec. 117 privileges of purchasers of copies of software programs, although formally preserved under the DMCA, are equally at risk from the use of technological anti-circumvention measures. The software consumer's right to adapt purchased programs and prepare archival copies of them were deemed essential in 1980, when what amounted to the "final compromise" of the 1976 Copyright Act was adopted at the suggestion of the Congressionally-mandated Commission on New Technological Uses of Copyright Works. Those privileges are as — if not more — important to consumers whose software purchases occur by way of on-line downloads rather than through face-to-face or mail-order transactions. However, nothing in the DMCA as enacted in 1998 mandates that consumer privileges be respected in the implementation of anti-circumvention measures. Current software industry practice suggest that at least some vendors will take advantage of new technologies and the legal support that the DMCA affords them to limit the effective scope of Sec. 117. Again, the DFC expects that the current study will take advantage of its unique mandate to inquire closely into the plans and intentions of software providers in the regard.

In addition, recent case law have may deprived the Sec. 117 exemptions of much of their practical force. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), and subsequent decisions hold that every temporary RAM copying of a computer program, incidental to its use on a hardware platform, constitutes a form of "reproduction." Although these holdings are controversial, they suggest that the use of computer programs by purchasers may now be legally constrained in ways that the Congress did not anticipate in 1980. The DFC believes that the study should consider ways to restore the vitality of the Sec. 117 exemptions in light of these subsequent developments. One such means would be to adopt language contained in both S.1146 and H.R. 3048, as introduced in the 105th Congress::

> Notwithstanding the provisions of Section 106, it is not an infringement to make a copy of a work in a digital format if such copying --
>
> (1) is incidental to the operation of a device in the course of the use of a work other wise lawful under this title; and
>
> (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Finally, we would note that the case law is in disarray concerning the effectiveness of contractual terms contained in so-called "shrink-wrap" and "click-through" licenses to override consumer privileges codified in the Copyright Act, such as the Sec. 109 "first sale" doctrine or the Sec. 117 adaptation and archiving rights. At the time of the enactment of the DMCA, the DFC had hoped that further refinement of the Uniform Computer Information Transactions Act ("UCITA," formerly "UCC 2B") would provide important clarification as to the scope of deference due to federal law in this respect. Unfortunately, the final text of UCITA, which is now before state legislatures for consideration, did not fulfill this expectation.

There are numerous examples of "end-user licenses" in the computer industry which purport to constrain or eliminate purchasers' Sec. 117 privileges. Where "first sale" is concerned, examples of the use of vendor-prescribed, non-negotiable contract terms to override the default settings of the Copyright Act is likewise a possibility. Through the use of such terms, the transfer of permission of authorized print-outs or downloads to portable storage media could be restricted. Clearly, even in the earliest stages of on-line commerce in texts, the continued vitality of the "first sale" doctrine is at risk — at least in some degree. Assessment of the full extent of that risk is, we believe, an appropriate task for the current study.

Ultimately, the DFC believes that the recommendations to Congress in connection with the study should be focused, in particular, on formulating a restatement of "first sale" appropriate for the digital condition. In so doing, we would urge that the language of H.R. 3048, quoted above, receive serious consideration. By stressing the importance of effective simultaneous deletion of transmitted material from the transmitter's system, this language creates the functional equivalent, in the new context of virtual information environment, of a doctrine that has served commerce, culture, and consumers well in the familiar actual one. Where Sec. 117 is concerned, we believe that the burden is on the proponents of change to make out the case that the balance so carefully struck in 1980 should not be maintained.

Moreover, the report to Congress should address additional measures that may be necessary to make existing and updated "first sale" principles meaningful, and to preserve the Sec. 117 exemptions. In addition to taking up the issue of temporary digital reproduction, it should consider the appropriateness of new legislation limiting the circumstances in which "second level" technological access controls can be deployed by content owners to override or frustrate use privileges otherwise conferred on content purchasers by the Copyright Act. The DFC notes that Sec. 1201(k)(2) of the DMCA, limiting the use of anti-circumvention measures in connection with certain audiovisual transmissions, provides a specific legislative precedent for such limitations on technological self-help. Congress explicitly sought to preserve the ability of consumers to make non-commercial copies of movies and other programs on standard analog VCRs when delivered over the air or via basic cable, while giving copyright owners the authority to block copying in situations in which consumers had no reasonable expectation of making copies. As Congress demonstrated, it is possible to achieve balance between the interests of information consumers and content creators. We look forward to presenting specific statutory proposals for other limitations on the implementation of technological protection measures in the months to come.

Likewise, we hope that the report will recommend new legislation, perhaps in the form of amendments to 17 U.S.C. Sec. 301, that would provide a clear statement as to the supremacy of federal law providing for consumer privileges under copyright over state contract rules which might be employed to enforce overriding terms in "shrink-wrap" and "click-through" licenses. Again, the DFC hopes to be able to assist the work of the study by proposing specific amendments on this preemption issue.

The DFC strongly believes that the issues to be addressed in this study are critical ones for the future of U.S. copyright. The tasks of the study are daunting ones, but we believe that given full cooperation on the part of all affected parties, including consumers and content owners, they can be accomplished. The DFC and its member organizations would be pleased to assist in any way. Specifically, we look forward to the opportunity to testify at hearings convened in connection with the study. Because the study has been mandated at such an early point in the development of networked digital communications and information commerce, it is inevitable that — in part — its conclusions will necessarily be based less on the actual experience to date than on informed predictions about future trends and developments. For these reasons, we believe that it is critical that there should be hearings on the issues covered by the study, and that the scope of those hearings address not only the record of the past but also the shape of things to come.

Respectfully submitted,

Peter Jaszi
For the Digital Future Coalition

Membership of the Digital Future Coalition

Alliance for Public Technology
American Association of Law Libraries
American Association of Legal Publishers
American Association of School Administrators
American Committee for Interoperable Systems
American Council of Learned Societies
American Historical Association
American Library Association
Art Libraries Society of North America
Association for Computers and the Humanities
Association of American Geographers
Association of Research Libraries
Chief Officers of State Library Agencies
College Art Association
Committee of Concerned Intellectual Property Educators
Computer and Communications Industry Association
Computer Professionals for Social Responsibility
Conference on College Composition and Communications
Consortium on School Networking
Consortium of Social Science Associations
Consumer Federation of America
Consumer Project on Technology
Electronic Frontier Foundation
Electronic Privacy Information Center
Home Recording Rights Coalition
International Society for Telecommunications in Education
Medical Library Association
Modern Language Association
Music Library Association
National Association of Independent Schools
National Council of Teachers of English
National Education Association
National Humanities Alliance
National Initiative for a networked Cultural Heritage
National School Board's Association
National Writers Union
Society for Cinema Studies
Society of America Archivists
Special Liberties Association
United States Catholic Conference
United States Distance Learning Association
Visual Resources Association

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COMMENT

Dears Sirs,

Per the DMCA of 1998, and your request for comments dated 6/5/000 on title 1 of the Act, I would like to add the following:

It firstly seems dubious to me, that no definition(s) have ever been added for "author" in Title 17 USC Section 101. Possibly this doesn't SEEM to have anything to DO with any such "Digital Millenium" bologna, but in LIGHT of the fact that recent awareness has revealed that several of the so-called "authors" of these same "works" that you all keep ARGUING about, are in fact recipients of stolen lyrics either through eavsdropping, "careful observance", or unwelcomed transcription/tape recordings; it would seem to me MORE than appropriate at THIS time to at least come up with some sort of a tentative DEFINITION of the word - because as it stands now, the general vagueness of the Statute seems to be causing MOST people to believe that, "if I just hurry on UP over there to the Copyright Office, and get that copyright on these WORDS that I wrote down, then I don't HAVE to give any credit, ON the copyright form or elsewise, to the person(s) I stole the recital(s) FROM...he he he". Scenerio #4: Stenographer kipes off with the dictation, runs over to the copyright office, copyrights the dictation, says SHE is the sole author - get the point? A person who "overhears" another person's recitals, especially if he is another artist, and goes and copyrights those same transcriptions WITHOUT mentioning the name(s) of the persons whom he or she "borrowed" them from, is just as much a thief as that STENOGRAPHER was. And apparently, we've been having quite a BIT of this sort of theft going on; and I think that it is all DUE to the fact that there isn't any solid definition of the word "author" per se.

So please DO allow me the following proposal, ans possibly for a couple of OTHER words; 'cause, how can you go ON with this "copyright" business, when you guys haven't even "gotten off the ground" about WHO the AUTHOR is?

Proposed Title 17 USC Section 101 additions:

"AUTHOR", is he who either dictates for a recorder, or puts the words down himself into the "tangible medium". The RECORDER (secretary, scribe, stenographer, etc.) is NOT the author except where that person's individual contribution can be ascertained, AND with the permission of the author - and then at best is only a CO-AUTHOR as in the case of a professor and his understudy. One does NOT need to hold any title or office to qualify as being "author" per se; "author" is not a legal designation, but only a condition of fact. It is not a condition of poverty or wealth, education or retardation, mental, physical, sexual, or spiritual fitness; and any such person alienating one such author for any of the aforesaid reasons, or any OTHER reason, is liable to the prosecution of which under Federal Laws either through civil litigation or/AND criminal prosecution.

"TALKER", is a modern day lay term for an oracle, prophet, seer, sooth sayer, or the like. For the purposes of this section, said "talker" is also an author. When one takes dictation from one such "talker", he acts as nothing more than a scribe, secretary, or stenographer, unless additional co-authorship can be ascertained.

"PLAGERISM", among other commonly known definitions, is the condition of THEFT whereby by a secretary, scribe, recorder, stenographer, or other similar transcriber ascribes to HIMSELF as sole authorship those words, ideas, compositions, or other works which dictating author has entrusted, through the law (common or elsewise), into the hands of the recorder for his safe keeping. Said plagerism of said dictation does NOT constitute any such "fair usage" for the plagerist and/or his assigns, and neither is said dictation within the "public domain". Prosecution for said plagerism would be either within the jurisdiction of the civil or/and criminal court.

If the foregoing "definitions" are elsewhere described, I appologize; but DO believe that it would be wise to include them within Section 101, due to the apparent confusion that has ensued.

Please reply to the foregoing and allow me to know what you think - I'm sure YOU wouldn't want YOUR words "eaten up" by these Little Gremlins.

Sincerely,
Walter C. Becktel
a_987654321@hotmail.com

John M. Zulauf

My name is John M. Zulauf and I am writing as private citizen and information technology professional. My comment is directed specifically at the questions posed regarding Section 109 regarding first sale and Section 117 archival, interoperability, and temporary copies. My comments will also contain references to "fair use" subjects -- space shifting, excerption, criticism, and time-shifting -- based on questions in the section "2. General."

The form of my comments today is to take a detailed view of a proposed comprehensive copy management and control architecture. This review address specifically the impact on 106 and 117 of comprehensive content protection systems now envisioned by the media and consumer electronics industry. This review will show a pattern of systematic elimination of the traditional first sale restrictions on the copyright holder, and further a systematic elimination of archival and all other fair use "rights" as traditionally held. The system achieves absolute control over the use of digital content by a comprehensive set of licensing restriction on the behavior of digital-media consumer electronics devices. This license is imposed by use of encryption protected (in the system architect's view) by an absolute anti-circumvention protection under DMCA section 1201.

The proposed system reviewed CPSA -- "Content Protection System Architecture; A Comprehensive Framework for Content Protection" is documented at http://www.dvdcca.org/4centity/data/tech/cpsa/cpsa081.pdf . The document itself is subject to copy controls such that it can neither be downloaded from the web nor saved from the Adobe PDF reader. The only means by which this criticism is possible is by page by page cut and paste from the document. Ironically and chillingly, were the CPSA document protected by CPSA, no such excerption or criticism would be possible at all. Because of this, were this document to prove to be a significant embarrassment to the DVDCCA and its authors, they could simply unpublish the work by removing it from their website -- thus removing all first source evidence of their current proposals.

While this is a lengthy response to these questions, and the detailed review of the CPSA is necessary to show the devastating extent to which traditional consumers rights can be erode using anti-circumvention as the wedge. The CPSA provides a chilling vision of our future unless broad exemptions to the DMCA 1201 anti-circumvention provisions are granted. These exemptions are discussed in the "3. Conclusions" section.

0. Abstract

A review of the proposed CPSA content control system and it's probable impact on fair use and first sale. Conclusions include the need for broad exemptions from the DMCA 1201 anti-circumvent provisions for all non-pay-per-view publish works and all works access for fair use.

1. Introduction:

The proposed CPSA gives us a view of the future of access and use control without the limitations imposed on the copyright holders and distribution channel that broad exemption to 1201 would bring. In this possible future, first sale is discarded, archival and other fair use abandoned in favor of a "comprehensive" control of all access and use of digital media. Note that no differentiation is made between published and broadcast work, nor between pay-per-view and unlimited view works. This lack of differentiation show the utter disregard for both first sale and fair use, as well as an intentional desire to eliminate the consumer rights granted in "Betamax" and "Vault v. Quaid" case law.

The following are excerpts from the current draft of the CPSA document identified as "Revision 0.81", dated February 17, 2000, and authored jointly by Intel Corporation, International Business Machines Corporation, Matsushita Electric Industrial Co., Ltd. and Toshiba Corporation. The excerpts are denoted by lines beginning with ">" and are quoted directly from the cited web document.

> *The protection comes from compliant devices responding*

> *appropriately to manage the content according to the CMI.*
> *Such protection is realized only if there is some*
> *means, or "hook", to compel devices to be compliant.*
>
> *Encryption is that hook. Encryption is a way of scrambling*
> *digital content so that it is unusable (not recognizable)*
> *unless it is first descrambled (decrypted). To get the*
> *necessary intellectual property to be able to decrypt the*
> *content, a license is required. That license contract*
> *specifies requirements to manage the content according to*
> *its CMI.*

The first expert from the CSPA document show the intent to utilize encryption systems not as content protection but as a negotiating "hook." The encryption is specifically disclaimed as not being the means of content protection "protection comes from compliant devices." This is of concern particularly as it is the position of the MPAA and the DVD-CAA that this "hook" encryption has unlimited DMCA 1201 protection and thus has the force of the entire US government behind it. That's no "hook," that's fishing with high explosives!

Further, it says that the encryption has nothing to do with protecting the content -- it's all about controlling the behavior of devices that want to use the content. This is explicitly use control after first sale. What it enables, as we shall see below, is explicitly taking away the end-users first sale and fair use with a non-party agreement.

2: CPSA Axioms

The CPSA system architecture comprises a set of axioms. As used in software and systems design, an architecture has to do with functional blocks, subsystems, key algorithmic components. The CPSA axioms function more like a set of contractual obligations than an overall system design. Aside from that the axioms are themselves collectively and separately a harmful to first sale and fair use, especially when considering non-pay-per-view content (broadcast or published). Ironically, there's still nothing in the axioms to prevent wholesale commercial piracy of published media. This content is still subject to DVD-stamping wholesale piracy. Thus the consumers' rights have been abridged with the copyright holder gaining no commercially meaningful protection.

> =============
> *CPSA Axioms*
> =============
> *CPSA provides a framework of 11 axioms that describe how*
> *CPSA-compliant devices handle the*

Note that the role of the axioms is explicitly control over the behavior of devices and thus "use control" as it in turn limits the functionality available to the consumer.

> *three major areas that are critical to ensuring a*
> *comprehensive, consistent content protection scheme:*
> *content management information, access, and recording.*

Fair use and first sale are not even a consideration in the design of this system. This is unsurprising in one sense, no system can be made which judge the intent of a use. However, their choice is thus to allow only the most limited use, disregarding other legitimate uses utterly prohibited by the design.

> *Content Management Information Axioms*
> *Content Management Information (CMI) is information carried*

> *with content that indicates limitations on its allowed usage,*
> *such as constraints on making copies.*
> *1. Content Owner Selects CMI*

This first axiom and all below it reveal a particular world view. In place of "copyright holder" -- the subject of the DMCA and other copyright law -- CPSA consistently refers to the "content owner." This implication of ownership stretches the copyright holders rights far past first sale and includes the ability to control the consumers use of legitimately acquired, published works.

While I am not a lawyer (IANAL) it is my understanding that the concept of "content owner" -- is pure fiction. There is a copyright holder who holds certain limited rights (limited by the "limited times" clause, and first sale and fair use) over their works, but there is no "content owner." Ownership of published content is not granted -- a copyright is. This distinction is important as the CPSA axioms all assume unlimited rights of the copyright holder over the digital work before and after first sale.

> *Axiom: The content owner selects the content management*
> *information (CMI) from the supported options.*

Implication: CPSA allows total control over the use past first sale of content regardless of the traditional balance in copyright law, case law (Sony Corporation of America v. Universal Studios, 464 U.S. 417 (198), hereafter referred to as "Betamax") to suit the needs of a media company's business model.

> *The content owner selects the appropriate content management*
> *information for his or her content from the supported options.*
> *The available options vary for different types of content according to*
> *agreements made between content owners and device manufacturers.*

Implication: the CPSA will allow non-party agreements to control the behavior of digital media purchasers after first sale through controlling the functionality of available devices.

> *2. Ensure Digital CMI Integrity*
> *Axiom: While the content remains in the encrypted digital form,*
> *the CMI integrity is ensured*

... by licensing terms imposed by the "hook" of encryption and backed up by the anti-circumvention provisions of the DMCA ...

> *during transmission and storage using the encryption and key*
> *management protocols.*

Implication: CPSA will allow copyright holders to ignore the Betamax decision and control the user's storage of broadcast content.

> *CMI is stored and/or transmitted along with the content.*
> *While the content remains in the encrypted digital form,*
> *the CMI can be carried digitally. For example, the CMI*
> *may be encrypted along with the content.*

Implication: CPSA can hide the CMI rules such that non-protected content cannot be known to be non-protected without decrypting the content. This ensures that only CPSA-compliant devices can be used even if the CMI rules would allow unlimited copying or access -- clearly controlling consumer use of digital media past first sale.

> *3. Optional Watermarking*

> *Axiom: At the content owner's option, the original content*
> *may be watermarked for the purpose of transmitting the CMI*
> *with the content, independent of its specific analog,*
> *digital or encrypted digital representation.*

Implication: Using CPSA the copyright holder can hide the CMI in the content so you can't know whether you can copy it without first decrypting the content. Also it means -- "if we're paranoid, we can reduce your image quality to encode our paranoia in the picture." Note below.

> *Some content owners may not want to include a watermark*
> *in portions of content where they are concerned about*
> *transparency, for example.*

> ======================
> *Access Control Axioms*
> ======================
> *In CPSA, encryption can be used to prevent non-compliant*
> *devices from accessing protected content. Alternatively,*
> *where encryption is not present, compliant devices*
> *control access by detecting watermark CMI and responding*
> *appropriately.*

Note that the purpose of encryption is not to protect the content but control the implementation of the devices. Note that nothing is said about the authority of the user (as granted by first sale or other means) or the "authority of the copyright holder", only the compliance of the device. While ignores the language of the DMCA, the use of encryption as the "hook" allows effectively bringing DMCA protection (under the view of the DVD-CCA) to these clearly unprotected implementation details.

> *4. Encrypt Prerecorded Content*
> *Axiom: All CPSA content on prerecorded media is encrypted.*
>
> *Content encryption is a key facet of CPSA. It ensures that*
> *the content cannot be accessed until it is decrypted.*

"All ... media is encrypted." What we have here is death sentence for public domain works, and the "limited times" clause. All digital content is locked up for the unlimited time of the non-party CPSA license agreement. Fair use and archival are dead -- all future media is owned by the media companies to serve their business models. This cannot be what the framers of the Constitution nor the authors of the DMCA had in mind.

> *In conjunction with licensing structures, it is the "hook"*
> *that compels users to honor the provisions of the content*
> *protection system. Thus, all digital content that has usage*
> *restrictions on prerecorded media (e.g. DVD-ROM) is encrypted.*

This not access control, this is use control. A LICENSE between an agent of the COPYRIGHT HOLDERS (the DVD-CCA) and the device MANUFACTURERS "compels the user." Note here the explicit non-privity. The user has signed no agreement giving up his or her fair use or first sale rights. Note also that the encryption isn't the protective measure but only the "hook" here again.

> *5. Encrypt Authorized Copies*
> *Axiom: All authorized copies of CPSA content are encrypted,*
> *except where specifically agreed otherwise.*
>
> *Just as all content with usage restrictions on prerecorded*
> *media is encrypted, so are all authorized digital copies*

> *of such content (meaning content that arrives encrypted*
> *and/or containing watermark CMI). For example, when a*
> *CPSA-compliant device receives analog*
> *content with watermark CMI, a digital copy of the analog*
> *input will be encrypted. This allows the encryption "hook"*
> *mentioned previously to remain in place even for authorized*
> *copies.*

So the copyright holders can (a) control by technical means when I can copy and (b) they will force my copy to be encrypted when they do allow it (c) and they can control this after first sale. By this means even the copies they allow me are walled off from me. Even where some copying is allowed, the real fair use, space shifting, first sale etc. are prevent as the content remains behind the CPSA wall of "axioms" -- unable for access except by CPSA-compliant devices.

> *An exception to this is the DVD-audio framework, which*
> *allows an unencrypted copy on legacy media (CD-R, CD-RW,*
> *Mini-Disc or DAT) of any audio content with a sound*
> *quality equivalent to CD-Audio or less.*

Oddly, CD-R and MP3's are explicitly excepted. From earlier testimony before the Library of Congress, "Napster" was the end of the world, doomsday scenario. Here CPSA does nothing to address it. In any case this isn't technically feasible and is only a bow to reality.

> *6. Playback Control*
> *Axiom: Compliant playback modules detect the watermark*
> *CMI when present in unencrypted content and respond*
> *appropriately to prevent playback of unauthorized copies.*
>
> *Before playing back unencrypted digital content, compliant*
> *playback modules check for watermark CMI. If present in*
> *unencrypted digital content, compliant modules will not*
> *allow playback, since all digital copies of content with*
> *watermark CMI should be encrypted.*

Note the authorization circular logic here. All unencrypted copies are de facto unauthorized. What is a the test for the "authority of the copyright holder"? Merely the presence of the encryption scheme. This is how the encryption hook is "set." Only encrypted copies are valid, and to play encrypted copies you need to licenses the CPSA IP. To do that you must agree to all their axioms. This is euphemistically referred to as "compliance."

> *7. Output Protection*
> *Axiom: For encrypted content, compliant playback and*
> *source modules apply an approved protection scheme to*
> *all outputs, according to the digital CMI settings,*
> *except where specifically agreed otherwise.*

> *Protection of encrypted CPSA content must continue during*
> *transmission, either by encryption (e.g., DTCP) or by an*
> *approved analog protection scheme such as Macrovision™.*

More contractual device control beyond the scope of the encryption. Every link, from player, to AV receiver, to video recorder, to television or video monitor must be compliant. As single piece of CPSA equipment forces all other new components to be compliant or be incompatible. Note the added cost and complexity now built in to every piece of consumer electronics.

> *8. Manage Protected Output of Unencrypted Content*

> *Axiom: Compliant source modules check the watermark CMI*
> *of unencrypted content prior to protected digital output,*
> *and if present, set the digital CMI for the output accordingly.*

This shows that the encryption is pure pretext and not needed except as the licensing "hook." Unencrypted data is given the same protection by compliant devices as encrypted data.

> *A compliant source module may optionally forward content*
> *that arrives unencrypted to a protected digital output.*
> *If it does so, the module must first check for watermark CMI,*
> *and if it is present, set the digital CMI of the protected*
> *output accordingly. This ensures that the digital CMI*
> *corresponds to the watermark CMI, which is necessary since*
> *compliant recording modules downstream will check only the*
> *digital CMI of encrypted content to determine if a copy is*
> *authorized.*

Note that encryption is not even needed once a critical mass of "compliant" devices is deployed. For a user, CPSA-compliant devices are viral. Once a CMI is detected, the content is treated as if it was encrypted (and in fact will be encrypted if recorded).

> ========================
> *Recording Control Axioms*
> ========================
> *Recording devices maintain content protection by examining*
> *digital or watermark CMI and making copies only if authorized*
> *to do so. Copies of content are encrypted (except as noted*
> *previously), and the digital and watermark CMI are updated*
> *to continue the protection of the copied material.*
>
> *9. Examine CCI Before Copying and Respond Accordingly*
> *Axiom: Compliant recording modules detect and respond*
> *appropriately to the CCI, if it is present, before creating*
> *a copy, if authorized to do so.*
>
> *o Digital CCI is examined for encrypted content*
> *o Watermark CCI is examined for unencrypted content*
> *Before making a copy, a compliant recording module checks*
> *the CCI information. If the module is making a copy from an*
> *encrypted source, it checks the digital CCI; otherwise, it*
> *checks the watermark CCI. The copy is made only if the CCI*
> *indicates that it is authorized.*

How can a device know when I have fair use rights? It cannot. Under the CPSA it can arbitrary control my ability to copy. Note again the implication that encryption is not necessary to protect works if devices are CPSA-compliant. Encryption is the "hook" to enforce the license, but unneeded functionality.

> *10. Update CCI Before Copying*
> *Axiom: Compliant recording modules appropriately update both*
> *the digital CCI and the watermark CCI, when present, before*
> *creating a copy.*

This is implementation housekeeping. Note again that encryption is not required for CCI as unencrypted but watermarked content receives the same protections.

> *Prior to creating a copy of CPSA content, compliant recording*

> *modules will appropriately update both the digital CCI and the*
> *watermark CCI, if present. Since the watermark CCI is always*
> *updated when a copy is made, compliant playback modules are*
> *not required to have watermark updating capability.*
>
> *Note that*
> *for non-CPSA content (unencrypted content without watermark*
> *CMI), a protection system may still support making an*
> *encrypted copy, in which case the digital CCI of the copy is*
> *set as defined by that system.*

It doesn't say what the CCI of the system is. Some CCI -- either "unlimited copies" or "no copies" -- is applied to my home videos or other non-CPSA at the devices discretion. Note that once CCI is applied, the content is then treated as CPSA content and always encrypted when recorded -- fully locking the user into using only CPSA-compliant devices even for content on which they (or no one) holds the copyright.

> *11. Temporary Images*
> *Axiom: Compliant recording modules do not inspect or update*
> *either the digital CCI or the watermark CCI when making an*
> *image that is both temporary and localized.*
>
> *To allow for enhanced (e.g. time-shifted) viewing of copy-*
> *never*

This is reveals another attack on fair use. It presumes that broadcast digital content (the only sort one would reasonably "time-shift") can be tagged as "copy-never." This is clear erosion of the Betamax decision. While below "time-shifting" is allowed within a given CPSA-compliant device, it is under far stronger limitations than those applied by Betamax with respect to archival and fair use.

> *content, compliant recording modules do not inspect or update*
> *either the digital CCI or the watermark CCI when making an*
> *image that is both temporary and localized.*
>
> *Content controlled in this manner must exist in a playable form*
> *for only a limited time, and must be stored in such a way that*
> *it can only be played back from the system used to create the*
> *image. Since such an image is not useful as an archival copy,*
> *it may be made independent of restrictions on copying indicated*
> *by the CCI.*

Here they pay some limited lip service to the Betamax decision and its implications regarding fair use "time shifting." However space-shifting, excerpting, and archival are clearly ignored. Also, it is unclear how can this be implemented on a software player without intrusive modifications of the file system, backup and network subsystems.

> *Note that although CCI is neither checked nor updated*
> *in this case, some types of content might contain other types of*
> *CMI, such as bits related to time shifting, that would need to*
> *be checked and*
> *updated appropriately.*

While the CCI always allows for the limited, same-device time shifting, CMI is allowed to prevent it. This is an interesting and deceptive approach. CPSA-compliant devices can claim that "time-shifting" is always allowed by the copy control subsystem. Since it can be prevented by the CMI, it's much like proclaiming an open door policy thus, "The door is always open -- but sometimes we electrify the porch."

3. Conclusions

As you can see above, current technological developments threaten the very essence of first sale and fair use. Under the CPSA or other potential, future schemes these are systematically eradicated for the sake of the mythical "content owner." How is this achieved? The use of encryption and the anti-circumvention provisions of the DMCA provide an irresistible "hook" for any arbitrary set of restriction to be imposed on device manufacturers. This is true (in the view presented within the CPSA draft) even if the designers of the system assert explicitly that the encryption is merely a pretext (a "hook") to force compliance to rest of the content control scheme.

Only broad exemptions to the anti-circumvention measures in the DMCA can dull this "hook" and prevent abusive and arbitrary schemes such as those proposed in CPSA. My recommendation for a sufficient set of exemptions are: (Note: in the following PPV is the abbreviation for "pay-per-view")

Class 1: published, non-PPV works

Exemption: full exemption from all anti-circumvention measures based on traditional first sale.

Class 2: works accessed for fair use

Exemption: full exemption from anti-circumvention for works after first sale (non-PPV) or first access (PPV) when utilized for fair use.

Class 3: broadcast works (including webcast, cable and pay-per-view)

Exemption: rights granted in the Betamax decision -- including non-encrypted archival, time and space shift, if access to work is legitimate (i.e. legal cable access, and pay-per-view authorization)

Without this we can expect that this dark, restrictive vision of CPSA will come to pass in the all to near future. Please remember that this document itself would not have been possible if the axioms described in the CPSA document had been applied to the CPSA document.

I thank you for you attention to this lengthy response.

Software & Information Industry Association

August 4, 2000

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Re: SIIA Comments Relating to the Joint Study by the Copyright Office and NTIA on Sections 109 and 117 of the Copyright Act

Dear Messrs. Feder and Joyner:

In response to the Federal Register notice of June 5, 2000 entitled "Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act" published by the National Telecommunications and Information Administration ("NTIA") and the Copyright Office, the Software & Information Industry Association ("SIIA") hereby submits the following comments on behalf of its members.

SIIA is the principal trade association of the software and information industry and represents over 1,000 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA and our members are extremely interested in issues relating to the interplay between new technologies, e-commerce and the copyright law.

General Comments

As recent as twenty years ago, the Internet did not exist, most consumers had not heard the term "software," digital content was unknown except to a few, and consumer electronics referred to radios, alarm clocks and turntables. But in the last twenty years, the ways that we as a society learn, communicate, conduct business, purchase goods and services, and entertain ourselves have fundamentally changed – all because of emerging new technologies, such as the Internet.

In fact, it has only been in the last several years that consumers could tap into the vast resources increasingly available on public and private networks. And it is only in that short time frame that businesses, schools and universities, governments and individuals have begun to provide a wide range of products and services to previously unreachable audiences.

Consumers and businesses are learning and growing together. The Internet is perhaps the most competitive marketplace today – one in which consumer demands are clearly and quickly communicated and businesses are able to respond in kind. With the speed of technology, companies are able to address new market needs rapidly and effectively. This is a far cry from the environment that gave birth to the first sale doctrine almost a hundred years ago.

The first sale doctrine first appeared in common law[1] and later was codified in Section 27 of the 1909 Copyright Act. Section 27 of the 1909 Act provided that "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."[2] Today, the first sale doctrine is found in section 109 of the 1976 Copyright Act. The doctrine provides that once a person comes into possession of a material object embodying the copyright owner's work that person can (subject to certain exceptions) dispose of possession of that object in any manner without violating the copyright owner's distribution right.[3]

When this provision was added to the Copyright Act in 1909 and subsequently adopted in the 1976 Act, Congress intended it to be used as a means for balancing the copyright owner's right to control the distribution of a particular copy of a work against the public interest in the alienation of such copies.[4] It is important to recognize, however, that alienation does not mean *unbridled* alienation. For example, Congress has deemed it appropriate to restrict the public's ability to transfer a copy of a work under the first sale doctrine by enacting the rental right limitations in section 109(b) because of the widespread piracy caused when businesses were could rent copies of computer software and sound recordings to the public. Thus, the purpose of the first sale exception is not to give unlimited ability to individuals to distribute their copies of a work, but rather to permit individuals to distribute their particular lawfully-owned copy of a work only when such distribution would not conflict with the normal exploitation of the work or adversely affect the legitimate interests of the copyright owner in that work.[5]

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[1] *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908) (holding that the copyright owner's right to "vend" his book did not give the copyright owner the right restrict future retail sales of the book or the right to require the that the book be sold at a certain price per copy).

[2] 17 U.S.C. § 27 (1970).

[3] These comments presume a working knowledge of sections 109 (first sale doctrine) and 117 (computer software exceptions) of the Copyright Act. For additional background information on the first sale doctrine, please refer to Keith M. Kupferschmid, Lost in Cyberspace: The Digital Demise of the First-Sale Doctrine, The John Marshall Journal of Computer & Information Law, Vol. XVI, No.4, at 825 (Summer 1998)

[4] *See* Craig Joyce, Copyright Law 528 (2d ed. 1991) (stating that "the first sale doctrine ... attempts to strike a balance between assuring a sufficient reward to the copyright owner and permitting unimpeded circulation of copies of the work").

Of particular significance to the study required by section 104 of the Digital Millennium Copyright Act ("DMCA") is the restriction contained in the first sale exception that limits the applicability of the exception to the "particular copy" of the work owned by an individual. Because of the nature of existing technology involved in transmitting a copy of a work from one computer to another, by the terms of the statute, the first sale exception will not apply to any such transmission. When a copy of a work is transmitted from one computer to another, the "particular" copy resides on the transmitting computer and a new "second generation" copy is created on the receiving computer. Accordingly, since transmission of works over the Internet involve the making of a new copy of a work and the first sale exception does not permit the creation of new copies, the transmissions of copyrighted works over the Internet does not fall within the coverage of the first sale exception.

In addition to the legal limitations on the first sale exception found in the Copyright Act and the case law, there are practical limitations inherent in traditional copyright distribution systems that serve to justify, to some extent, the first sale exception. The reduction and, in many cases, elimination, of these practical limitations in the e-commerce environment drastically reduces the need for a first sale exception. The diminished practical barriers associated with a network delivery system has and will continue to encourage content providers to use new licensing mechanisms and new means for delivering works to consumers. These new licensing and delivery mechanisms will enable just about any computer user to obtain a copy of virtually any work easily and quickly. In fact, these new licensing and delivery mechanisms will promote alienation and trade in copyrighted works to such a degree that individuals will have less of a need to avail themselves of the first sale exception because they will easily be able to get a copy of a work online. Accordingly, there is no need for the first sale exception to apply to the Internet and related digital distribution systems.

Therefore, with regard to the first sale exception, SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 Report that: (1) the first sale exception does not apply to digital distribution mechanisms such as the Internet; and (2) given the Congressional intent underlying the first sale exception and the ease by which consumers have and will have access to a wider variety of copyrighted works that ever before, there is no need for the first sale exception to be expanded into the digital distribution environment.

With regard to section 117, our only general comment relates to the public perception and interpretation of the section 117 exception. All to often, we have become aware of persons engaged in software and content piracy who are using section 117 as the justification for their actions. For instance, we have come across numerous people who attempt to auction off their so-called back-up copies of their computer software or who make pirate software available on websites, ftp sites or chat rooms under the guise of the section 117 back-up copy exception.[6]

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[5] H.R. Rep. 94-1476, 94th Cong., 2d Sess. 80 (1976). *See also* Agreement on Trade-Related Aspects of Intellectual Property ("TRIPs"), Art. 13, which requires the United States to confine its limitations and exceptions, including section 109, "to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

One need look no further than the testimony of Robin Gross of the Electronic Frontier Foundation during the 1201(a)(1) rulemaking as evidence of the misunderstanding of the scope and effect of section 117. In her testimony, she claimed to have the right to make a back-up copy of a DVD for personal use, but when asked for the legal basis for her claim, she stated that she was unfamiliar with section 117.[7] Unfortunately, Ms. Gross' statement are only the tip of the iceberg. There are many others who claim to have the right to make a back-up copy under the law without truly having any understanding of the parameters of section 117.

Consequently, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of section 117. The days of people using section 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public on the "dos and don'ts" of section 117 (as well as other provisions of copyright law) conducted by the Copyright Office and the Administration.[8] SIIA would be pleased to contribute its resources and experience to this much-need educational program.

Response to Section 109 Questions

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[6] We will be pleased to provide you with evidence of these examples if requested.

[7] *See* Hearing On Exemption To Prohibition On Circumvention Of Copyright Protection Systems For Access Control Technologies, 280-81 (May 19, 2000) at http://www.loc.gov/copyright/1201/hearings/1201-519.rtf

MR. CARSON: What other fair uses of a DVD can't engage in under the current regime?
MS. GROSS: If I want to make a back-up copy for my own personal use.
MR. CARSON: Okay. Let's stop with that. What case law tells you that you have a fair use right to make a back-up copy of the DVD for your own personal use?
MS. GROSS: I think that Sony v. Universal Cities says that.
MR. CARSON: Really? That's an interesting proposition.
MR. MARKS: I don't think Sony says that.
MS. GROSS: Software law specifically allows you to do that, and DVDs certainly fall under software.
MR. CARSON: DVDs fall within Section 117, is that what you're saying?
MS. GROSS: DVDs are software.
MR. CARSON: Okay. Are you saying that they're covered by Section 117?
MS. GROSS: I'm not really sure what 117 is.
MR. CARSON: Okay. You might want to take a look at it, and let us know in your post-hearing comments.

[8] We understand that the Copyright Office and the Patent and Trademark Office have educational programs in place, but given the misunderstanding and lack of knowledge that the public has with regard to the copyright law, we believe that further steps need to be taken to educate the public on certain aspects of copyright law.

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on circumvention of technological protection measures has had on the operation of the first sale doctrine.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on falsification, alteration or removal of copyright management information has had on the operation of the first sale doctrine.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

Electronic commerce ("e-commerce") has many different meanings.[9] From a business perspective, e-commerce provides the opportunity to market goods and services to a global audience at relatively low cost. For many companies, e-commerce is an increasingly important business strategy. Whether a company offers subscriptions for information services, electronic delivery of software, video or other entertainment or combines Web sales with traditional delivery, no industry can afford to ignore this emerging paradigm.

For consumers, e-commerce provides opportunities for unprecedented choice, convenience and access to creative content. Users can conveniently browse goods at online stores from their homes. No longer limited by geography, consumers can visit stores around the world, comparing prices, quality and service from several vendors. As a result, and as stated in more detail above, SIIA believes that the development of e-commerce has resulted in a reduced need for the first sale doctrine.

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

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[9] *See* SIIA, Building the Net: Trends Report 2000 (2000) (an online report analyzing six key trends shaping the digital economy. The Trends Report 2000 provides a concise overview of the rapidly changing software and information industry. The report examines areas of rapid and dramatic change by considering market demographics, consumer behavior, evolving business models, relevant policy initiatives and emerging technologies. The Trends Report 2000 is accessible online at http://www.trendsreport.net. Titles of the six trends include: Software as a Service, The Value of Information, The Digitization of Business, Customer Empowerment, The Business of Policy, and Education Anytime, Anywhere.

Perhaps the greatest challenge to policymaking in the high-tech era is adapting to the time difference. Not from Eastern to Pacific, or even Washington to Brussels, but rather from "policy time" to "Internet time." Today's time challenge is much more complex: requiring the adapting (where appropriate) and application of laws to a constantly evolving technology driven universe. Innovation and flexibility are the essence of the Internet and new information technologies. With business models evolving around technology so rapidly, it is difficult to craft an adequate public policy framework for right now. Because policy crafted for today could very well be outdated and restrictive tomorrow, the importance of not creating a new set of laws and maintaining an industry, competition driven universe is that much more essential.

Achieving a balance between moving fast enough to meet immediate needs and demands, while not responding too quickly as to stifle growth, poses a very real challenge. It is not realistic to expect policymakers to live-up to that challenge without the guidance from industry. Therefore, before taking any position on the effects of technology on the first sale doctrine, we urge the Copyright Office and NTIA to fully consider the industry comments filed pursuant to this study, as well as the actions taken by SIIA member companies and other industry representatives to get their products and services into the hands of consumers through the use of new emerging technologies and new distribution mechanisms incorporating digital rights management.

As stated throughout these comments, SIIA strongly believes that no change to the language of section 109 is appropriate. Not only is such a change unwarranted, but even if one were to proffer some good reason for changing the scope of section 109, we assert that it is much too early in the development of e-commerce and that business models are evolving much too rapidly to make any changes in section 109 at this time.

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

As stated above, the first sale doctrine is premised on traditional methods of distribution and traditional media. The first sale doctrine plays no role in present-day digital distribution methods because such methods (i) do not involve the transfer of one's "particular copy" of a work, and (ii) require the making of a second generation copy of a work, thereby implicating the copyright owner's reproduction right – a right not at issue in section 109.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The emergence of new technologies makes copyrighted works more accessible than ever before. As a result, (as stated in more detail above) there is less need for an individual to transfer his or her particular copy of a work to another, because that other person can easily and effortlessly obtain their own copy of that work from the copyright owner or the copyright owner's authorized distributor. In fact, in many cases it is or will be actually easier to obtain a copy from the copyright owner. Therefore, the rationale for the first sale doctrine – the alienation of copyrighted works – is significantly reduced by emerging new technologies.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

No. The first sale doctrine should not be expanded to apply to digital transmissions. As stated above, SIIA believes that the development of e-commerce and digital distribution systems that make copyrighted works more accessible than ever before have resulted in a reduced need for the first sale doctrine. It should also be noted that the Administration considered this issue in 1995 when it published its White Paper on "Intellectual Property and the National Information Infrastructure" and concluded that no legislative action was needed to revise the rule for digital content.[10] Moreover, only a few years later Congress too considered proposed legislation to revise the first sale exception during its consideration of the DMCA, but ultimately rejected the concept. There has been no significant change since the Administration and Congress considered the issue to warrant reconsideration or a change in policy by the Copyright Office or NTIA.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

No. We are not aware of any evidence indicating or establishing that the absence of a digital first sale doctrine under present law has had any measurable effect (positive or negative) on the marketplace for works in digital form. As stated above, SIIA believes that the development of e-commerce and digital distribution systems that make copyrighted works more accessible than ever before have resulted in a reduced need for the first sale doctrine.

Response to Section 117 Questions

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on circumvention of technological protection measures has had on the operation of section 117.

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[10] *See* Bruce A. Lehman, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 90-95 (Sept. 1995).

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

We are not aware of any effects, adverse or otherwise, that the enactment of prohibitions on falsification, alteration or removal of copyright management information has had on the operation of section 117.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

We are not aware of any effects, adverse or otherwise, that the development of electronic commerce and associated technology has had on the operation of section 117.

(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

See response to question (d) under the heading "Response to section 109 Questions" above.

(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

Section 117 was enacted at a time when software was primarily distributed on floppy discs that could be damaged by inadvertently scratching, bending or demagnetizing the disc. The need to make a back up copy of your software in those days was therefore essential.

Technology and business models have evolved considerably since then. Nowadays, software is primarily distributed on CD-ROM and the potential of inadvertently damaging a CD-ROM in a way that makes the software contained on the disc inaccessible is an extremely rare occurrence. In the not-to-distant future (and to some extent at the present time), software will be sold as a service over networks, making inadvertent software damage as extinct as a Tyrannosaurus Rex. The Application Service Provider ("ASP") model provides the potential for software to evolve away from the individual desktop and/or network to a server hosted by the copyright owner or authorized distributor on the Internet. There, the software can be accessed any time and anywhere by the user, thereby eliminating the need for individual back-up copies. As a result, in the future, the need for the provisions in section 117 relating to the making of a back-up copy will no longer exist.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

See response to question (e) above.

Response to General Questions

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

At this time, we can think of no additional issues that should be considered.

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

At this time, we do not believe that hearings would be useful in preparing the required report to Congress. We reserve the right to change this response depending on the content of other comments filed on or before August 4th. If hearings are held, however, SIIA would like to participate in such hearings.

In closing, we would like to once again thank the Copyright Office and NTIA for providing us an opportunity to express our views on these very important issues. If we can prove any supplemental information or clarify any of our comments please do not hesitate to contact us.

Sincerely,

Ken Wasch
President

Stanford Linear Accelerator Center

SLAC Comments For Possible Inclusion in the Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

by

John M. Thompson
Legal Clerk
SLAC Office of Technology Transfer

1. Section 109

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

Prohibitions on circumvention of technological protection have had no effect on the operation of the first sale doctrine. Current technological protection measures are easily defeated and do little towards protecting digital works from duplication, resale, and distribution. Additionally, duplication of digital works is extremely efficient and difficult to trace. This makes enforcement of technological protection laws nearly impossible. However, for a user who does not defeat technological prevention measures, the circumvention clause of the DMCA can make it difficult to resell products. In that case the first sale doctrine is negatively impacted by prohibitions on circumvention of technological protection.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

Because copyright laws are extremely difficult to enforce as applied to digital works, prohibitions on falsification, alteration or removal, of copyright management information has had no effect on the first sale doctrine. Digital works such as computer programs, digitally encoded music files (MP3), and digitally encoded movies (DVD, AVI, ASF, MPEG) are often distributed for free on the Internet with copyright notices intact. There is little reason or incentive for software "pirates" to remove the notices. In fact, leaving the copyright notices intact helps to show that the illicit copy is the genuine product. Fear of copyright enforcement seems to be almost non-existent and those trading in illegal files act without regard to the law.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

Electronic commerce has had little effect on the first sale doctrine. Electronic commerce is merely an alternative method to buy and sell goods and services. Tangible goods are usually delivered via a shipping service. Once the consumer receives those goods, the first sale doctrine applies as normal. The buyer is then free to resell the goods, subject to standard limitations. For transactions that take place only in the digital realm, the first sale doctrine applies the same way as it does to tangible goods. Because digital goods are much easier duplicated than tangible goods, digital goods are more often duplicated and redistributed for free or for minimal cost.

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

As the copyright laws currently stand, with enforcement as applied to digital works nearly impossible, the burden of protecting intellectual property is increasingly falling on the producers rather than the law. Those developing new technologies are continually developing new ways of protecting their works. This often comes in the form of a technological lock or protection against unauthorized duplication. Because the locks are usually easily defeated most digital works can be found for free download on the Internet.

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The first sale doctrine is most effective as applied to "old technology works" such as print media. Unlike digital, printed objects are much more difficult to reproduce and distribute on a wide scale level. Because of this, it is difficult for the original buyer to keep a copy of the product and sell the original. However, with digital works, copies are easily made with no loss of quality between copies. This allows consumers to easily make copies, and distribute those copies, while at the same time retaining their original. The first sale doctrine as applied to digital works is much less effective than it is when applied to non-digital works.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The emergence of new technology (specifically digital works) has made the copyright laws obsolete and ineffective. Digital works are easily reproduced and redistributed. Once a digital work resides on the hard drive of a single user it is extremely easily redistributed to many users. This conduct is nearly untraceable and results in many illicit copies of digital works. Technological fixes have developed as an alternative to copyright to protect digital works. However, technological protections are routinely defeated and do little to protect intellectual property. Currently, copyright laws, in relation to digital works and individual users, are generally followed on the honor system. However, development of intellectual property continues to flourish, suggesting that other forces are at work which encourage the creation of new intellectual property. For this reason, the lack of the applicability of copyright laws to digital works is not as problematic as it might seem at first glance.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

Like owners of "old technology works" (such as printed books), owners of works in digital forms should be included in the first sale doctrine. It has long been recognized that a consumer that buys a product also has a right to resell that product. Although digital works are easily reproduced, this is not a reason to not extend the first sale doctrine to owners of digital works. The principles of the first sale doctrine must apply equally to all products. The first sale doctrine should not be limited to certain works only because some works are easier to reproduce than others. Other methods must be developed to control reproduction rather than changing the fundamental principles of the first sale doctrine.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

Consumers would be provided with more protection if the first sale doctrine were extended to digital works. If an owner of a computer software program wants to resell it he does so at the risk of violating the law. If the first sale doctrine is extended to digital works it will rightfully provide the same protections to all types of works.

2. Section 117

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

Acts permitted under § 109(a) and § 117 may be in violation of § 1201(a). For example, one who has purchased a CD-ROM has lawfully acquired access to that work. Under § 109(a) and § 117 that person is allowed to use the disc in another computer or lend it to a friend. However, if that CD-ROM requires connecting to a central computer and entering a password upon use, any attempt to circumvent the password protection for a lawful purpose (such as lending the CD to a friend) will violate § 1201(a). This dilemma can be resolved by amending the law to only bar circumvention of technological measures controlling access to a copy of the work. Then, once you had lawfully acquired your copy, you would be able to lawfully use it in a computer, or circulate that copy, without further prohibitions imposed or reinforced by the Copyright Act. Despite the current illegality of circumventing technological protection measures, these measures are routinely defeated. So, in practice the law has not had a significant effect on controlling copying and distribution of digital works.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

Like the above scenario, prohibitions on falsification, alteration or removal of copyright management operation has the potential to collide with acts permitted to the owner of a copy under § 117. In order to lend a lawfully acquired CD-ROM to a friend, that friend might be required to falsify ownership information of the program in order to access the software. While loaning the software to a friend is permitted under § 117, falsifying the ownership information in order to access the disc is not allowed under § 1201. However, actions in violation of § 1201 regularly occur and the law has done little to prevent the violations.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

In some ways electronic commerce has further hindered the consumer's ability to take advantage of permitted acts under § 117. For example, a consumer may never actually posses a copy of a program, but only use the program across a computer network. This allows the producer of the software to control access without needing protections of copyright laws. Because copyright laws are doing little to stop the unauthorized reproduction and distribution of digital works, this is one example of how companies are coping with the ineffectiveness of the copyright laws as it relates to digital works.

(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

Emerging technology is being created in a way that does not rely on § 117 or any other section of the copyright law to protect it. Producers are developing more sophisticated methods of tracking use of software and access to software. Until copyright laws or a new method is developed that better protects digital works, technological protections will continue to be developed and improved upon.

(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

Section 117 seems directed to software that is easily copied and circulated. It does not apply to software that is used over a network which is never in the physical possession of the user.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

Section 117 applies to computer programs that are in the possession of the user. It might not be as applicable to software which is never in the possession of the user, but is accessed only across a computer network.

3. General

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

Copyright law in regard to digital works is not protecting the intellectual property embodied in these works. Currently it is almost impossible to trace the unauthorized duplication of digital works. A new system needs to be instituted for protecting digital works. This new system might work best if it is based on controlling access to the works.

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

Hearings would be helpful in determining the direction, if any, Congress should take with regard to protecting digital works. I am willing to participate in the hearings.

Ken Arromdee

I'm writing to comment about the DMCA yet again, having commented before on 1201(a)(1). Unfortunately I don't have the time to produce a full-length formatted message this time, but I'd like to register my objections to the impact of the DMCA upon first sale.

Specifically, in the MPAA vs. 2600 case, brought under the DMCA, the Motion Picture Assocation of America has tried to stop creation of an open-source DVD player for the Linux operating system. One of the MPAA's claims is that a user isn't "authorized" to view a DVD just because he's purchased a DVD. The MPAA requires that the user get a licensed player; otherwise his attempt to access the work is illegal under the DMCA.

Since a DVD is useful because of its content, allowing the companies to control who can legally access the content on the DVD is effectively equivalent to allowing the companies to control who can legally own the copy, thus interfering with the right of first sale. (Technically, of course, the physical DVD can be still be transferred to another person, but this transfer is useless without the right to access the DVD's content.) For instance, an importer of foreign DVDs who has legally purchased those DVDs should be able to sell them (by the first sale doctrine) to people living in the US. However, the MPAA will refuse to authorize a DVD player without a signed contract that requires that the DVD player only play DVDs from one region of the world. This will make it impossible to sell the DVDs to anyone who doesn't either own two DVD players set for different countries (a vanishingly small percentage of DVD player owners), or own an unauthorized player or a player with the access control circumvented (illegal under the DMCA).

It should be noted that while the Linux player involved in the lawsuit is in an early stage, and Linux is not as popular as Windows, that does not mean that the DMCA claims in the lawsuit affect only the relatively small number of Linux users. If an "unauthorized" software player for Linux is allowed, the theory means that "unauthorized" players are allowed, period. Any manufacturer would be able to produce a DVD player without having to implement any of the onerous contractual restrictions on which the DVD-CCA and MPAA have conditioned authorization. Any consumer would be able to walk into a store and buy a DVD player that plays DVDs from any country, has no Macrovision, and allows the user to skip commercials. And needless to say, the impact on the market for DVDs caused by restrictions such as region coding would not exist.

A similar situation exists for Playstation games and other video games. Video games, like DVDs, are typically produced with region protection, which means that a game is useless to someone from a different part of the world than the one for which the game has been produced. The user can get around this by buying an unlicensed player (such as the Bleem or Virtual Gamestation emulators) which circumvents the access control, or by modifying their Playstation console to circumvent the access control by itself. (Note that Sony has claimed that modified Playstations can be used to play pirated games, but has failed to mention that they play legally-purchased import games.) However, under the above interpretation of the DMCA, these activities would be prohibited and foreign Playstation games would become unusable by US Playstation owners and thus, unsellable.

Robert S. Thau & Bryan Taylor

"Authority of the copyright owner" in 1201(a), and First Sale

Robert S. Thau and Bryan Taylor

August 4, 2000

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Acknowledgments

This paper is the result of discussions on the `dvd-discuss` mailing list, part of the Openlaw forum of the Berkman Center for Internet and Society at Harvard Law School, and has benefitted immensely from the insights of those on the list. All flaws are, of course, solely the fault of the authors.

1 Introduction

The Digital Millenium Copyright Act gave copyright holders remarkable new powers to regulate the distribution of their works, which have raised concerns that the traditional balance in the law — between the rights granted to copyright holders and the public interest — is being eroded. These concerns might be allayed somewhat if the copyright holders were carefully staying within the bounds and intent of the law. However, that seems not to be the case. In one of the first trials under the law, Universal et al. v. Corley (one of the so-called "DeCSS cases"), the copyright holders have adopted a sweeping view of their powers under the law; indeed, a view far more broad than anything envisioned by the members of Congress as described the intent of the law in their debates and reports.

Specifically, the movie studios' case in Universal et al. v. Corley relies on an interpetation of the Digital Millenium Copyright Act (DMCA), specifically 17 USC 1201(a) — a view already articulated by their attorney, Dean Marks, in hearings for the librarian of Congress — which we regard as fundamentally flawed. This section of the law provides protection for "access control mechanisms", which as we shall show, was clearly intended by Congress to mean mechanisms which perform some sort of affirmative check that a viewer is authorized to view a particular work. Several such systems have been deployed by the movie studios to protect their work, including one (codeveloped with Circuit City, and marketed to consumers under the name "Divx") which actually checked the authority of a particular viewer to view works distributed on DVD disk. However, the "Content Scrambling System" (supposedly "hacked" by the authors of the program at issue in this case) performs no such check; a CSS-enabled player will view *any*CSS formatted DVD without performing any check that the user is authorized to view it.

Further, the studios are claiming a right to impose arbitrary conditions on the implementation of the CSS technology, via the license terms which they seek to impose on player manufacturers. These terms already include the implementation of a "region coding" mechanism, which is intended to prevent disks sold in one region, designated by the movie studios, from being played in another — with an obvious impact on, among other things, the ability of a purchaser to resell a work, one of the cornerstones of first sale. And nothing in the studios' interpretation would keep them from imposing further conditions, which could very well have the effect of annihilating the first sale doctrine in practice.

The copyright office, in this round of requests for comments, asks how the implementation of the DMCA has affected the first sale doctrine. We will demonstrate in this paper that the effect is already substantial, and threaten to become worse. The copyright office also asks whether additional issues should be considered. We suggest the following:

- What is required for a technical measure to be an "access control mechanism", and how much control does the law grant copyright holders over those mechanisms?

- Are the movie studios using the DMCA to claim statutory protections for use of their works, and not just access? Are these claims consistent with the text of the law, and with Congressional intent in passing the law?
- Does the DMCA exceed the Constitutional bounds of Congress's power to grant intellectual property rights, by granting patent-like control over "access control" processes without any time limit?
- Is there an interpretation of the law which eliminates those Constitutional issues, and statutory protections for use controls, while still providing statutory protection for strong, effective technical mechanisms which allow copyright holders to protect their works?

This paper proposes such an interpretation of the law, demonstrates that it provides statutory protection for several strong, existing protection mechanisms (including one that applies to works distributed on DVD disk), and shows that it avoids severe problems with the interpretation advanced by the movie studios.

2 Technical facts of the case

The plaintiffs in this case are most of the major movie studios in this country. This case concerns movies which they publish on Digital Versatile Disc (DVD). The process of formatting these discs includes the application of the so-called Content Scrambling System (CSS), which transforms the files containing the video and audio comprising the movie into an obscured format. The details of this obscured format, and the process of converting it to industry-standard formats (e.g. MPEG) which may then, after many further conversions, be displayed to a human viewer are licensed by the plaintiffs, via their intermediary, the so-called DVD Copy Control Authority (DVD-CCA), to player manufacturers.

2.1 CSS, and restrictions on its use

Licensees are required to obey numerous conditions on their use of the CSS technology by the terms of the non-public license. These conditions are known to include implementation of a system called "region coding", which requires a player sold in America, for example, to refuse to play discs sold for use in Europe, or vice versa. (Among other measures, a player is required to keep a permanent record of the region it resides in, and to allow this record to be changed only a small, fixed number of times without being reset at the factory). These requirements also currently include the implementation of certain copy-control technologies designed to inhibit transfer of movies onto VCR cassettes (the so-called "Macrovision" machinery). However, the studios and their agents have acknowledged that these mechanisms are technically distinct from CSS `per se` and bound to it only legally by the requirements of their license. They have also included among these conditions such matters as region coding, which have nothing to do directly with either access control or copy control, which comprise between them the subject matter of the DMCA. As the plaintiffs' witness, Robert Schumann stated in his second declaration:

> 23. As I also stated in my recent deposition, CSS and the decryption of it via DeCSS has nothing to do with protecting so-called regional coding or any mechanism which prevents consumers from fast-forwarding through the initial audiovisual information contained on a DVD disc (which includes copyright infringement warnings. and the like).

(Schumann supplemental declaration, June 1, paragraph 23).

The defendants in this case are distributing an unlicensed implementation of the CSS technology, called "DeCSS", which, like the licensed implementations, can take the obscured video files stored on commercial DVDs and convert them to unobscured form. This is the first of several conversions required to make these files visible to a human viewer, and is a necessary step in viewing the content on a DVD (others being conversion from a highly compressed form called "MPEG" to uncompressed digital video, formatting that digital video so hardware display drivers can process it, and the conversion of the digital data to analog signals driving an actual display; the analog signals are generally processed further within a display, but those steps are of no concern to us).

As such, DeCSS performs a function which is absolutely necessary to viewing the content on legitimately purchased DVDs to which CSS obscuration has been applied — players which would clearly serve a legitimate function. In fact, as testimony at the trial has shown, DeCSS was originally written to serve as a component of such a player (Universal v. Corley, Johansen testimony, p. 619 of the trial transcript).

2.2 The "threat" of piracy

The movie studios have claimed, in submissions in Universal v. Corley and elsewhere, that CSS is part of a copy-control regime which is necessary to prevent "piracy" (that is, unauthorized coyping) of their works, justifying that claim in part by saying that digital technology allows the creation of limitless copies without generational loss.

This piracy could conceivably take one of two forms. One would be creation of unauthorized physical copies of DVD disks, by "bootleggers";

this is alleged to be common on the Pacific Rim. However, when pressed, representatives of the movie studios have been candid in admitting that the CSS technology does nothing at all to prevent such bootlegging. For instance, consider the following exchange, at a hearing held at Stanford University by the Copyright Office, Dean Marks, a lawyer representing the movie studios' trade organization, the Motion Picture Association of America (MPAA), stated flatly in colloquy with David Carson of the Copyright office:

MR. MARKS: A duplicated DVD disk is going to duplicate the CSS encryption.

MR. CARSON: And can be played on any legitimate player.

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MR. MARKS: And can be played on any legitimate player, legitimate licensed CSS player. And not be played on non-licensed players.

MR. CARSON: Okay. So I don't see how you're stopping the -- I don't see how you're stopping the piracies of DVDs in that respect. Pirated DVDs can be sold on the open marketplace and played in any legitimate DVD player.

MR. MARKS: Without infringement copyright?

MR. CARSON: No, no, no. Certainly not. But we know pirated goods are on the market all the time.

MR. MARKS: Yes, they are.

(Transcript, LOC hearing on the DMCA, Stanford University, May 19, 2000, pp. 246-247).

We will be reviewing much more of this remarkable colloquy, and will in particular be returning to Mr. Marks' intriguing focus on control of DVD players, rather than control of works on DVD. But the important point here, for the moment, is that Mr. Marks freely admits that the CSS technology does nothing to prevent unauthorized copying of disks.

But, there is another form of illegitimate copying which the movie studios routinely invoke, namely copying of their works from person to person via the Internet — a threat supposedly enhanced by the possibility of making limitless copies of a digital work without generational loss over multiple generations of copies.

However, the trial has established that this is at best, a distant threat. The volume of information on a DVD — several gigabytes — is simply too vast to transmit over even a fast, local network, let alone the far slower, wide-area links which characterize the Internet as a whole. In order to argue that such transmission is even feasible, the movie studios have had to argue that the video data on the DVDs can be compressed far further. But, that video data is already highly compressed; as testimony at the trial has demonstrated, performing this compression with any current compression technology necessarily involves throwing away some video data entirely, and substantially degrading the quality of the video in the process. Further, expert opinion in the field of compression is that breakthroughs which will allow drastically better high-quality compression of full-motion video (as opposed to special cases, like stills where 3-D geometric data is available) is unlikely, and further progress in the field will be incremental over the next few years. (Testimony of Peter Ramadge, Universal v. Corley transcript, pp. 884-932).

So, whatever digital copies can be made are in fact, significantly degraded from the originals, despite their digital nature. Furthermore, they are by nature missing any of the "extras" which the movie studios have included on many DVDs (alternate audio tracks, etc.), which are significant selling points for the DVD over alternatives such as VHS.

And yet unlike, say, compressed audio files, they are still too large to conveniently transmit over the Internet. The compression in Prof. Ramadge's examples was to make the files small enough to fit on a conventional Compact Disk (CD), about 650 megabytes. Extrapolating from experiments performed by Ole Craig, a witness for the defense, a file the size of a CD would take more than three hours to transmit over a dedicated T1 line, to another computer which was very close in internet topology. (Craig's experiment involved transferring a 1.5 gigabyte file, which took over seven hours; prorating to the smaller file at issue here is simple arithmetic). (Declaration of Olegario Craig, Universal v. Corley)

And this T1 line is many times faster than commonly available home internet access. The effective bandwidth available through even a fast home internet connection (e.g., DSL) is generally much less. The fastest home DSL connections from Bell Atlantic (now Verizon) are 0.64 million bits per second, compared to the 1.5 million bits per second available on a T1; prorating, we find nearly an eight hour download time for a CD's worth of data. And even DSL connections are still relatively rare. The movie studios note that higher bandwidth is available to researchers at some universities, but those are for supervised research and do not go, say, to the dorms. Very few people, no matter how ill their will, would have the patience to sit still for hours to receive a poor-quality copy of a movie over the Internet, when the price for renting the high-quality original, with all its extras, is nominal.

Lastly, it is worth noting that those who desire to obtain a digital copy of the video data on DVD, for whatever reason, have other tools available (e.g., "DOD speed ripper"). At trial, the MPAA's head of antipiracy efforts, Mikhail Reider, claimed, unconvincingly, not to remember hearing of those tools (Universal v. Corley transcript, Reider testimony, p. 680), but they were clearly available before DeCSS; at trial, one of the authors of DeCSS described how he examined such a tool in the course of his work. (Universal v. Corley transcript, Johansen testimony, p. 623). Yet, while the movie studios have filed not one, but three separate lawsuits seeking to enjoin distribution of DeCSS, in three different states, they have not taken any legal action at all against distribution of these other tools, which facilitate "Internet piracy" in the exact same manner as DeCSS.

So, DeCSS rates three lawsuits, and "speed ripper" not even one. A reasonable person might conclude that DeCSS threatens the movie studios' interests in a way that these other tools do not — and in a way other than facilitating "Internet piracy", since they're all the same in that regard.

There is, however, a significant difference — "speed ripper" relies on the CSS descrambling performed by a commercial DVD player; it works by capturing that player's output in digital form. DeCSS implements CSS descrambling itself. As regards "Internet piracy" that's irrelevant — the same results are achievable either way.

However, DeCSS does allow you to do something which "speed ripper" does not — it allows you to build a player which will render works on DVD without going to the movie studios (or their agent, the so-called DVD Copy Control Authority) for a license. Indeed, as we have already noted, testimony at the trial has established that that is why it was written, and one of the authors has received a prestigious national prize for the work. (Universal v. Corley transcript, Johansen testimony, p. 627).

It is this sort of activity — making a legitimate DVD player, not "Internet piracy" — which will be most directly affected by a finding in favor of the plaintiffs.

2.3 The prayer for relief

The plaintiffs are suing to enjoin further distribution of DeCSS, claiming that their licensed implementations of the CSS technology provide a form of access control which is being "circumvented", or more simply, bypassed, by the unlicensed DeCSS implementation.

What makes this a peculiar claim is that there is nothing about any implentation of the CSS technology, either licensed or unlicensed, which would ever, in the ordinary course of the operation of CSS, deny any viewer access to the contents of any CSS-formatted DVD. If an unlicensed CSS implementation would reduce the contents of a given disc to (more) readable MPEG video data, then any licensed implementation would do the exact same thing. There is never any case in which the two implementations do anything different. How, then, can the plaintiffs claim that one of these things is providing an access check which is bypassed by the other?

To answer that question, let us begin by examining the law, and how it may be applied to two access control mechanisms of a sort which it is unquestionably intended to cover. Having done so, we will return to CSS, and to the contorted interpretation of the law which leads the plaintiffs to claim that CSS is providing access control despite the fact that in the ordinary course of its operation, it can never deny access.

3 Access controls and the DMCA

3.1 The applicable statute

The Digital Millenium Copyright Act was enacted by Congress to protect certain forms of electronic defenses which copyright holders might adopt for their works, by adding a new chapter, 12, to Title 17 of the United States Code, which defines copyright law. Two distinct types of mechanisms are protected — access controls, in section 1201(a) of the law, and copy controls, in section 1201(b). The plaintiffs' case relies on construing CSS as an "effective access control", as defined in 1201(a). So let us examine how that term is defined. In section 1201(a)(3)(B) of the law, we find that, for purposes of section 1201:

> (B) a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

If that is the case, then section 1201(a)(2) provides that

> (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that–
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

where "circumvention" is defined in 1201(a)(3)(A) as:

> (A) to 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner

So, "effectively control access" is defined in terms of "gain access to the work" — which is not, itself, defined in the DMCA. Seeking definitions from common language, we find that any common dictionary (e.g., Merriam-Webster) defines three senses for the word "access": it can refer to a right, a means, or an act.

The most straightforward interpretation, in context, is that the technological measure must govern the act of access — that is, it must, "in the ordinary course of its operation", perform some explicit test that the user is authorized by the copyright owner to view a particular work, and allow the act of viewing the work only in case that he is, in fact, authorized.

But, there are other possible readings; let us consider them. Clearly, it makes no sense to adopt the sense of "access" in which to "gain access" is to be granted the legal right to view something. That would reduce the law to nonsense; it would speak of technical means which somehow require the application of a process to a copyrighted work in order to allow a viewer to form a contract.

This leaves the interpretation in which "access" is a means, and the technical measure checks whether the viewer is using authorized means of acccessing the work. However, the technical measure itself is necessarily part of the means of access, so at the very least this reading lends a strange circularity to 1201(a)(3)(B). But nevertheless, as we shall see, that is the plaintiffs' reading. (Strangely, they seem to think this control extends over only means which employ cryptography in some way, even though the definition of "effective access control" never mentions cryptography, encryption, or decryption; of that, more anon). We will also see that this is how CSS itself is designed to function — it does not and cannot check that the user has been authorized by the copyright owner to perform the act of access — and we shall show see that this interpretation is at variance with both expressed Congressional intent in passing the DMCA, and with basic Constitutional principles regarding intellectual property protection.

But before doing that, it may be worth showing that our alternative interpretation, that "effective access controls" are restricted to measures which govern acts of access, does provide copyright holders with an opportunity to provide meaningful protection for their work, and that we are not trying to read the statute into nonexistence or irrelevance. So, let us examine a few examples of effective access controls under this definition.

3.2 Examples

On our reading, then, an "effective access control" is one which performs an explicit test that the viewer is authorized, and circumvention consists of bypassing, or negating the effect of, such a test, in order to provide access to a work to a person who would have been denied access "in the ordinary course of [the access control's] operation".

This is a fairly broad definition, which provides statutory protection for numerous mechanisms which the plaintiffs can build to protect their works. We will consider three.

3.2.1 Pay-per-view cable

In pay-per-view (PPV) cable case, programs are distributed to everyone in a particular cable network, but in a scrambled form. If a viewer desires to view one of these programs, then they make arrangements, including payment, with their cable provider. The cable provider then downloads a "key" for that particular program into that individual viewer's set-top box. When the program is broadcast, the set-top box applies the key to the scrambled program, obtains the program in unscrambled form, and shows it to the customer. In this scenario:

- All cable customers have set-top box hardware, but only some are authorized to view a given program.
- In the ordinary course of the system's operation, there are PPV programs which a customer can view — but only those the customer has been specifically authorized to view (by arrangement with the cable company).
- In the ordinary course of the system's operation, there are PPV programs which a customer cannot view — namely, those which the customer hasn't paid for. The system is performing an explicit test as to what programs a user is authorized to view, and denying access if not.
- "Circumvention" on our present reading, would consist of measures which defeat the above check, by, for instance, fooling the cable company into downloading a key when the user hasn't paid for a program, or filching keys from another customer's set-top box.

3.2.2 Circuit City Divx

Of course, in the PPV cable case, the work being protected (the pay-per-view programming) is never fixed in tangible media. But that is not essential; it would be easy to design a scheme in which players for DVD-like discs would similarly require a key to be downloaded into them in order to play the contents of a particular disc.

This mechanism would preserve the essential properties of PPV authentication which we have already discussed:

- All customers have player hardware, but only some are authorized to view a given disc.
- In the ordinary course of the system's operation, there are discs which a customer can view — but only those the customer has been specifically authorized to view (by arrangement with the central office, mediated by the player).

- In the ordinary course of the system's operation, there are discs which a customer cannot view, those for which payment has not been arranged. The system is performing an explicit test as to what programs a user is authorized to view, and denying access if not.

- "Circumvention" on our present reading, would consist of measures which defeat the above check, by, for instance, fooling the player into playing a disc which had not been paid for, or billing the wrong account.

A scheme along these lines was actually marketed as "Divx" by Circuit City, in conjunction by the plaintiffs; the internal technical details of the scheme were different, but it looked the same to consumers in most respects, including most notably the requirement that the player be able to phone a central office (via an internal modem) to manage billing. (There is, of course, no connection between this scheme and a video compressor, also called "Divx", which has also been mentioned by the plaintiffs).

3.2.3 Certificates

We conclude with a less widely used, but still useful, example: certificates. MIT uses this mechanism to secure web access to student records. Briefly, a "certificate" is an electronic analog to a physical ID card with a watermark or raised seal — a datum which is difficult to produce by someone without particular authority, but which anyone may easily inspect to determine that it has been produced properly. These are used in electronic communication as follows: a "certification authority" issues certificates to individuals who wish to be identified. (MIT serves as its own certification authority) They can subsequently present these certificates, via their web browsers, to a web server, which verifies that they have a proper certificate (the analog to a physical ID card with the proper seal), and may read the certificate to verify the user's identify (as a guard might read the ID card). The web server can then use the "certified" identity to determine whether or not to server a particular web page to the viewer — in the MIT case, to assure that students view only their own records.

Note that while it is common practice to encrypt data protected by the certificate mechanism, simply to protect it from potential prying eyes as it traverses the network, that does not form part of the mechanism, and we would still have effective access control without it. This will become an important point later. To summarize again:

- All MIT students can get a certificate, but only some — in fact, only the student and administrators — can view any given student's records.

- In the ordinary course of the system's operation, there are records which a student can view — but only those the student has been specifically authorized to view (usually his own).

- In the ordinary course of the system's operation, there are records programs which a customer cannot view — in the MIT case, other students' records.
- "Circumvention" on our present reading, would consist of measures which defeat the above check, by, for instance, forging a certificate, or convincing the web server to serve a student's records in the absence of that student's certificate.

Many other access control mechanisms besides the ones we have discussed can be imagined, which all share those properties, but we need not go into all the possibilities here. The point is that the reading of the law which we have proposed allows the plaintiffs a variety of ways, some of which have already been deployed, to protect their content.

But, our reading does not provide protection under the law for a scheme like CSS, which, as we have seen, does not discriminate between movies that a user is authorized to view and those which they are not, and always grants access "in the ordinary course of its operation". To argue for protection for CSS under this law, then, the plaintiffs must adopt another reading. And they have.

4 CSS, DeCSS and plaintiffs' analysis

The plaintiffs believe this case is simple and straightforward. To quote one of their attorneys, Leon Gold, in pretrial hearings:

> Circumvent means to descramble, and that's what DeCSS does. A technological measure effectively controls the access here to do the protected work and CSS is such a measure and it's designed to control access to our copyrighted works. Because CSS is an encryption technology, you've got to have a software key to open it, so CSS qualifies as an access control measure. And all of the statutory requirements are met, and defendants are clearly violating them.

Note the peculiar statement that "Because CSS is an encryption technology, CSS qualifies as an access control measure". This already indicates that the plaintiffs have adopted a somewhat strained reading of the statute. The statutory definition of "effective access control" — that an effective access control measure is one that "requires the application of information, or a process or treatment, with authority of the copyright owner, to gain access to the work" — makes no specfic reference to encryption. Instead, as we shall discuss in detail, it requires that the technological measure so described have a particular effect. As we have already seen, it is perfectly possible to have an access control measure which does not encrypt the work it protects;

conversely, it is possible to employ encryption technology for purposes such as electronically signing documents, which have nothing to do with access control.

But rather than relying on Mr. Gold's perhaps hasty and off-the-cuff remarks, let's examine a more elaborate version of this argument, from the colloquy between David Carson and Dean Marks at the Stanford LOC hearing, concerning the notion of "authority" which is crucial to the statutory definition of "effective access control":

> MR. CARSON: Are [DVD buyers] authorized to view [their DVD] on any machine they can find, that they can make to view it?
>
> MR. MARKS: No, no. They're authorized to view it on a licensed device. If someone were to buy a VHS cassette, and they didn't have a VHS player, are they authorized to disassemble the videocassette, reproduce the film in there in 35-millimeter print and play it on their movie camera? I don't think so.
>
> PAGE 249
>
> MR. CARSON: Okay. But, first of all, there's no contractual privity between the purchaser of that DVD and Time Warner, I assume. There's no shrink-wrapped license. You know, you don't sign a license saying, "I agree only to play this on an authorized player," when you purchase the DVD.
>
> MR. MARKS: That's correct. And neither is there a shrink-wrapped license when you buy a VHS cassette that's in NTSC format, and you only have a PAL player.

(Transcript of LOC hearing at Stanford, pp. 248-249).

So purchasers of a DVD are not entitled to view their DVD "on any machine they can ... make", but only on "a licensed device". But that is not due to any contractual obligation they personally have entered into, but due to the DMCA. However, once you have an authorized player, you are guaranteed to be able to play a given DVD; the player performs no authorization checks.

Note that the terms in which this is couched are rather different than in our analysis above — they speak, for instance, not of authorized viewers who may or may not be authorized to view a particular movie, but rather of authorized players which, if authorized, may play any DVD.

What makes such a player authorized is, in the plaintiffs' view, the CSS license. If removal of the CSS obscuration is done by a licensed player, then the player has the authority of the copyright owner, and is therefore authorized. However, if the exact same process is performed by a player which was created by someone without a license, then it is unauthorized, and therefore circumvention, never mind that the two processes have the exact same effect.

Note also, that it is the manufacturer of the player who must be licensed in this view — CSS licenses are not required of individual viewers, nor even, in the usual case, available to them. This system is not about controlling the access of individuals to DVDs; it is rather used to control (via the CSS licensing requirement) who may create players for them.

This is how our reading of the statute differs from that of the plaintiffs. We read the "authority of the copyright owner" to be the authority of a given user to view a particular work. But in the case of CSS, the copyright owners are claiming the right to control how, or whether, a particular piece of equipment performs a particular process

It should be noted that the plaintiffs go on to state that this control only applies to "access control processes", and they sometimes go on to state that CSS fits that description because it is "an encryption process". Of which, more anon.

5 Problems with plaintiffs' analysis

There are a number of problems with the plaintiffs' assertion of a right, stemming from 1201(a), to vet the application of certain processes to their content. The legislative record is clear that Congress did not mean to create such a right, on the part of the defendants, and indeed amended the bill to avoid such an interpretation. Also, there are some basic Constitutional problems with this new exclusive right to vet implementations of an access-control process, which simply do not arise if the statute is read, as it seems clear that Congress intended, simply to give copyright holders the right to control access (and sue only when access was or might be provided to an unauthorized viewer).

5.1 Conflicts with the First Sale doctrine

In the spirit of the LOC's request for comments, let us first consider how the plaintiffs' interpretation of the DMCA relates to the First Sale doctrine, codified at 17 USC 109. This section of the copyright laws governs what rights are transferred to the purchaser of a published work, in the absence of a contract with the copyright owner (which clearly does not exist in the case of DVDs). It states that when a copy of a published work is sold, the purchaser acquires all rights other than those listed in 17 USC 106 as exclusive rights of the copyright owner. In fact, 17 USC 109(c) specifically provides that the right to privately display the work is transferred.

In other words, the first sale doctrine states that when a published work is sold, the coypright owner voluntarily parts with the rights of control associated with ownership of a copy, and the purchaser of the DVD acquires the right to display the work to an audience in the physical presence of the copy. Since display inherently requires the act of access if the work is scrambled, the right of access is part of the larger right to display — authority over which, once again, the copyright holder has voluntarily surrendered at the point of sale.

However, as we have seen, the movie studios claim that this rule no longer applies in the case of DVDs. They believe that they retain authority over how a work on DVD may be lawfully displayed, because that display is only lawful when it is performed, in Mr. Marks' words, on "a licensed device" — licensed by them, via their agents, the DVDCCA — despite the failure of the studios and their agents to ever announce this requirement to the DVD purchaser. And if all such devices implement some measure which restricts use of a work, such as region coding which prevents viewers from viewing a disk which they purchased in Europe, then the viewers have no lawful alternative way to access the content on the DVDs which they purchased. This obviously impacts the scope of possible resale, one of the rights traditionally acquired by the purchaser under the first sale doctrine. And the scope of further restrictions that might be imposed in the future is limited only by the studios' imaginations in drawing up their license.

In his colloquy with Mr. Carson of the LOC, Mr. Marks acknowledged that "the technological protection measure is not only dealing with access, but also with subsequent uses of the content" (transcript of the LOC hearing at Stanford, p. 261). (Representatives of libraries, universities and the public objected at those proceedings to the imposition of persistent use controls in the guise of 1201(a) access controls).

This analysis presumes that there is no contract which would alter the terms of sale of the published work, but in the case of DVDs, that is uncontested. See, for instance, Mr. Marks, representing the MPAA, once again in colloquy with Mr. Carson of the LOC:

MR. CARSON: Okay. But, first of all, there's no contractual privity between the purchaser of that DVD and Time Warner, I assume. There's no shrink-wrapped license. You know, you don't sign a license saying, "I agree only to play this on an authorized player," when you purchase the DVD.
MR. MARKS: That's correct.

(Stanford LOC hearing transcript, p. 249).

An alternative reading of the situtation, of course, would be that the first sale doctrine still applies, and that the movie studios have surrendered their right to control private viewing at the sale of a DVD. Note that if surrendering display rights as per first sale is not to the taste of certain copyright owners (including, evidently, the movie studios), the law does give them an option: they may license, rather than sell their works, as is commonly done with software, pursuant to an explicit license agreement which imposes whatever additional restrictions are to their taste; contract law, then, rather than copyright law should apply. And such a model of sales would impose scant burden on the studios; following the practice of software shrink-wrap license agreements, they can simply notify the buyer of the contract in a prominent way, and allow the purchaser to return the work if they don't agree with the terms. In fact, there is precedent for exactly that arrangement with the "DivX" pay-per-view scheme for controlling DVDs, which did require the consumer to sign an explicit contract.

Incidentally, the prospect of communicating restrictions by license agreement could largely eliminate apparent conflict between 17 USC 109, the First Sale doctrine, and 17 USC 1201, the anticircumvention provisions of the DMCA. If a copyright owner wants to exercise their right to control access to a published work via technical measures, granted by 1201, all the First Sale doctrine requires is that they provide a license agreement in a manner which notifies the purchaser of the restrictions on what they have purchased, and allow for returning the product if they don't like the terms. That seems only fair.

But, on the studios' reading of the law, such a conflict clearly exists.

5.2 Encryption not required for access control; any process could be regulated

To summarize where we have arrived: the movie studios have adopted a reading of the law which allows them a patent-like control over processes which are required to gain access to their works — that is, once again, that the law is meant to give them control over not just the *act* of access, but the *means*. They are suing because DeCSS threatens to allow DVD purchasers to develop their own technologies and devices – competing DVD players – to access the works they have purchased.

When asserting this control, in court and elsewhere, the studios and their representatives are always careful to qualify it, by saying that this right to authorize means of access extends only to "access control processes", and not other kinds of processes. For instance, as we have seen, they have been careful to state in court that CSS is an access control process because it uses cryptography (a debatable position in and of itself, once the nature of that cryptography is analyzed, as we have seen).

However, no support for this assertion may be found in the statute. Neither the definition of access control nor that of circumvention in 1201(a) requires any particular structure of the access control mechanism, or the nature of the measures used to circumvent it. The definition of "effective access control" states simply that an effective access control must "require the application of information, or a process or a treatment, with the authority of the copyright ower, to gain access to the work"; there is no restriction on the technical means by which this requirement is met. And while the definition of circumvention discusses descrambling and decryption, it also encompasses any other technique which allows a user to "avoid, bypass, remove, deactive, or impair a technological measure", again with no restriction to particular technical means.

Also, the studios use the terms "decrypt" and "descramble" interchangably, but standard rules of statutory construction tell us that different words apply to different things, and the range of technological measures which may be described as "scrambling" is so broad that it is no restriction in practice. For instance, we have already mentioned the MPEG compression process which is used on DVD video even without CSS. This process is intended solely to compress the data, with no pretense of access control. Yet, the compression process involves throwing away some of the data and thoroughly scrambling the rest, and intensive computation is required to "descramble" it back to ordinary digital video.

Lastly, let us note that there are real, deployed examples of access control (certificates, as discussed earlier) where the use of encryption, if any, is wholly incidental, and not a part at all of the access control provided. You can have access control without encryption — and the movie studios' reading would have the bizarre effect of denying such systems protection under the law.

In short, the notion that the law is restricted to processes which are somehow cryptographic is fallacious. If the law actually grants the movie studios the authority they claim, then they could exercise that authority over anyprocess which is necessary to gain access to one of their works, such as, for instance, a video compression algorithm. Thus, they would secure the benefits of a patent on that process without meeting any of the requirements (originality, protection for a limited time), a point to which we shall return.

5.3 Access controlled is access to a market, not access to a work

Another problem with the studios' analysis is that, contrary to the letter of the statute, they are not using CSS to control access to works. As we have noted already many times, any DVD will play in any DVD player. What they are using it for is to impose conditions on the manufacture of players — some of which have to do with the goals of the DMCA (e.g., imposition of Macrovision copy control), and some of which simply do not (e.g., region control).

In other words, the studios are asserting that the DMCA gives them the right to control access into the market for DVD players, by requiring anyone who builds a player to enter into a license agreement, to which they can attach arbitrary terms.

Again, it is interesting to observe the colloquy of Mr. Carson of the LOC, and Mr. Marks, representing the MPAA, on this point. Mr. Carson began by noting that CSS, as described by Mr. Marks, had nothing to do with access control as he (correctly) understood it:

> It strikes me that what we are describing is perhaps a copying control device in access control clothing. In other words, you've got a device that controls access to a work, but not in the way that, certainly before this rulemaking began, I thought we were talking about. We were talking about access control devices.
>
> In other words, I assumed -- naively, perhaps -- that a technological measure that controls access to a work, the purpose of that is to make sure that authorized users and only authorized users are getting access to the works. So if I paid the price to the copyright owner otherwise be able to use that work, then I'm entitled to use it.
>
> And if he somehow gets access to it by circumventing encryption or passwords, or whatever, then she's in trouble because she's not an authorized user. I'm not in trouble because I am. That's got nothing to do, as far as I can tell, with what you're talking about.

(LOC hearing transcript, p. 245)

Here is what Mr. Marks had to say in response:

> MR. MARKS: I think it's partially a fair description. I think it is also used -- the fact that the work is encrypted is used to try and guarantee that the user has legitimately -- has legitimate access to the work as well. I mean, I don't think it's completely devoid, the CSS system, of trying to ensure that those people that -- for example, would just simply duplicate the DVD disks -- you know, pirates who would duplicate the DVD disks.
>
> And if there were pirate players that were unlicensed, they wouldn't be able to play those disks because they were encrypted with CSS. That serves an access control function as well.

(LOC hearing transcript, p. 246)

So, Mr. Marks suggests two "access control" functions for CSS. One of these functions is, in fact, copy control, not access control; the other has to do with "pirate" players. Furthermore, Mr. Marks immediately admitted that CSS does not, in fact, have anything to do with copy protection, per se, returning once again to players:

> MR. CARSON: But a duplicated --

MR. MARKS: A duplicated DVD disk is going to duplicate the CSS encryption.

MR. CARSON: And can be played on any legitimate player.

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MR. MARKS: And can be played on any legitimate player, legitimate licensed CSS player. And not be played on non-licensed players.

(LOC hearing transcript, pp. 246-247)

So, the only "access control" function served by CSS is, by Mr. Marks own testimony, regulation of the player market — specifically, restricting it to "licensed players". Where a licensed player, of course, is one whose manufacturer agreed to the full terms of the CSS license agreement — terms which, like region controls, may have absolutely nothing to do with the purposes of the DMCA. And later, when Mr. Carson asked what defined an "authorized user", in the view of Time Warner, Mr. Marks replied that that was anyone who had legal possession of a DVD and a licensed player (the only legal kind of player, in the MPAA's view):

[MR. CARSON:] In other words, there's no reason to believe as a general proposition that someone who has a commercially manufactured and marketed DVD, manufactured by Sony, perhaps, or any of the major studios -- Time Warner, whatever -- is not an authorized user.

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If someone has that DVD which is manufactured by Time Warner, you're going to presume they're an authorized user, aren't you?

MR. MARKS: Yes. Although you'd have to sort of define what you mean by authorized user. If someone has purchased a DVD from Time Warner, they're authorized to play it on a licensed DVD player. They can play it as many times as they want, there's no restriction on saying it's a one-time play, it's a two-time play.

(LOC transcript, pp. 247-248)

So, again, Mr. Marks makes plain that CSS has nothing with do with seeing whether a given user gets to see a movie — if they have the disk, CSS will allow any licensed player to play it for them. The sole "access control" function of CSS, on Mr. Marks' own explicit testimony, is to restrict DVD playback to "licensed" players — i.e., those whose manufacturers have agreed to abide by the movie studios' restrictions, whatever they may be.

Before the passage of the DMCA, this would have been somewhat questionable; indeed, it has at least the appearance of an illegal tying arrangement. But that is not what we wish to investigate here — we simply wish to know if this is the sort of arrangement that Congress meant to protect when they passed this law. So, let us see.

5.4 Inconsistent with Congressional intent

The legislative history, unsurprisingly, does have something to say about how Congress envisioned the relationship between the copyright holders and makers of players for their works. Both houses of Congress wanted to maintain the rule established in the Betamax case, that any device with a legitimate purpose was legal, and that the copyright holders not be able to decide among themselves what constituted a legitimate purpose. Sen. Ashcroft, in the Senate:

> In discussing the anti-circumvention portion of the legislation, I think it is worth emphasizing that I could agree to support the bill's approach of outlawing certain devices because I was repeatedly assured that the device prohibitions in 1201(a)(2) and 1201(b) are aimed at so- called "black boxes" and not at legitimate consumer electronics and computer products that have substantial non-infringing uses. I specifically worked for and achieved changes to the bill to make sure that no court would misinterpret this bill as outlawing legitimate consumer electronics devices or computer hardware. As a result, neither section 1201(a)(2) nor section 1201(b) should be read as outlawing any device with substantial non-infringing uses, as per the tests provided in those sections.
>
> If history is a guide, however, someone may yet try to use this bill as a basis for initiating litigation to stop legitimate new products from coming to market. By proposing the addition of section 1201(d)(2) and (3), I have sought to make clear that any such effort to use the courts to block the introduction of new technology should be bound to fail.
>
> As my colleagues may recall, this wouldn't be the first time someone has tried to stop the advance of new technology. In the mid 1970s, for example, a lawsuit was filed in an effort to block the introduction of the Betamax video recorder. I think it useful to recall what the Supreme Court had to say in ruling for consumers and against two movie studies in that case:
>
> > One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

> As Missouri's Attorney General, I had the privilege to file a brief in the Supreme Court in support of the right of consumers to buy that first generation of VCRs. I want to make it clear that I did not come to Washington to vote for a bill that could be used to ban the next generation of recording equipment. I want to reassure consumers that nothing in the bill should be read to make it unlawful to produce and use the next generation of computers or VCRs or whatever future device will render one or the other of these familiar devices obsolete.

(Congressional record, 14 May 1998, p. S4890).

Which was echoed on the other side of the aisle; here are remarks from Rep. Klug, in the final debate on the Conference Committee bill:

> Both of these changes share one other important characteristic. Given the language contained in the Judiciary Committee's original bill, specifically sections 1201(a)(1), (a)(2), and (b)(1), there was great reason to believe that one of the fundamental laws of copyright was about to be overruled. That law, known as Sony Corporation of America v. Universal Studios, 464 U.S. 417 (198), reinforced the centuries-old concept of fair use. It also validated the legitimacy of products if capable of substantial non-infringing uses. The original version of the legislation threatened this standard, imposing liability on device manufacturers if the product is of limited commercial value.
>
> Now, I'm not a lawyer, but it seems irrational to me to change the standard without at least some modest showing that such a change is necessary. And, changing the standard, in a very real sense, threatens the very innovation and ingenuity that have been the hallmark of American products, both hardware and content-related. I'm very pleased that the conferees have meaningfully clarified that the Sony decision remains valid law. They have also successfully limited the interpretation of Sections 1201(a)(2) and (b)(1), the "device" provisions, to outlaw only those products having no legitimate purpose. As the conference report makes clear, these two sections now must be read to support, not stifle, staple articles of commerce, such as consumer electronics, telecommunications, and computer products used by businesses and consumers everyday, for perfectly legitimate purposes.

(Congressional Record, 12 Oct. 1998, p. H10621)

But, might it change things if a player manufactured without the co-operation of the copyright holders exposed their works to the possibility of unauthorized duplication? The answer, as clearly envisioned by Congress, is no; they even amended the law to try to preclude such an interpretation.

Sen. Ashcroft, again, in the immediate continuation of the speech quoted above:

> Another important amendment was added that makes clear that this law does not mandate any particular selection of components for the design of any technology. I was concerned that this legislation could be interpreted as a mandate on product manufacturers to design products so as to respond affirmatively to effective technical protection measures available in the marketplace. In response to this concern I was pleased to offer an amendment, with the support of both the Chairman and the Ranking Member of the Committee, to avoid the unintended effect of having design requirements imposed on product and component manufacturers, which would have a dampening effect on innovation, and on the research and development of new products. Accordingly, my amendment clarified that product designers need not design consumer electronics, telecommunications, or computing products, nor design and select parts or components for such products, in order to respond to particular technological protection measures.
>
> This amendment reflects my belief that product manufacturers should remain free to design and produce consumer electronics, telecommunications and computing products without the threat of incurring liability for their design decisions under this legislation. Nothing could cause greater disaster and a swifter downfall of our vibrant technology sector than to have the federal government dictating the design of computer chips or mother boards. By way of example, during the course of our deliberations, we were made aware of certain video boards used in personal computers in order to allow consumers to receive television signals on their computer monitors which, in order to transform the television signal from a TV signal to one capable of display on a computer monitor, remove attributes of the original signal that may be associated with certain copy control technologies. I am acutely aware of this particular example because I have one of these video boards on my own computer back in my office. It is quite useful as it allows me to monitor the Senate floor, and occasionally ESPN on those rare occasions when the Senate is not in session. My amendment makes it clear that this legislation does not require that such transformations, which are part of the normal conversion process rather than affirmative attempts to remove or circumvent copy control technologies, fall within the proscriptions of chapter 12 of the copyright law as added by this bill.

(Congressional record, 14 May 1998, pp. S4890-S4891).

In this example, Sen. Ashcroft cites a device which actually bypasses a technical protection measure as not actionable circumvention under the law, because the end effect is not to provide a work to an unauthorized person. (The amendment to which Ashcroft refers was codified as 1201(c)(3)).

In these quotes and others, Congress was expressing a clear intent that the DMCA not be used as a club for copyright owners to dictate how products like computers, programs, and DVD players could be designed — an intent that was echoed in the House debate (by Klug and others), and carries straight through to the Conference Committee report:

> Persons may also choose to implement a technological measure without vetting it through an inter-industry consultative process, or without regard to the input of affected parties.

(Congressional Record (House), 8 Oct. 1998, p. H10065)

Note here that copyright owners are specifically denied the right to vet and approve implementations of their access control measures. In fact, they go on to stress that such reimplementations are allowed to suppress incidental effects, if that's needed for usability:

> Under such circumstances, such a technological measure may materially degrade or otherwise cause recurring appreciable adverse effects on the authorized performance or display of works. Steps taken by the makers or servicers of consumer electronics, telecommunications or computing products used for such authorized performances or displays solely to mitigate these adverse effects on product performance (whether or not taken in combination with other lawful product modifications) shall not be deemed a violation of sections 1201(a) or (b).

(Congressional Record (House), 8 Oct. 1998, p. H10065)

This makes plain that the only protection afforded under 1201 is against products which perform circumvention per se — for 1201(a), that would be actually allowing unauthorized access — and not for whatever incidental effects an access control mechanism might have or perform. Other Congressmen made similar remarks, and some were even more emphatic than the ones I've quoted so far. Here's Sen. Kohl, speaking before the floor vote on the Conference Committee's final bill:

> [1201(c)(3)] reflected my belief that product manufacturers should remain free to design and produce the best, most advanced consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Creative engineers–not risk-averse lawyers–should be principally responsible for product design.

(Congressional Record (Senate), 8 Oct. 1998, p. S11888)

5.5 Inconsistent with other provisions of the DMCA

We might also note that the injunction sought by the plaintiffs in Universal et al. v. Corley would harm some fields of activity specifically protected by the DMCA.

Cryptographic research, for example, is the study of security systems and their failures; to the extent that CSS qualifies as an access control mechanism, or security system, at all, it is clearly a fit subject for such research. And it is a field of endeavor granted specific protections in the DMCA, as 1201(g). However, that research can only proceed if the researchers are allowed to communicate precise descriptions of the system, its components, and its operation — and it is exactly that communication, in the form of computer source code, which the plaintiffs are seeking to enjoin.

The movie studios' interpretation is also somewhat difficult to reconcile with the provisions for reverse engineering in the Act. The whole point of reverse engineering, as it is ordinarily practiced, is to allow an engineer to discover features of a system or product which its manufacturer has chosen not to disclose, in order that the engineer can design a device with similar functions without having to license the relevant details from the manufacturer. But if a license is required for the engineer's product to be legal anyway, why protect the process of reverse engineering?

5.6 Inconsistent with Constitutional principles

Finally, the movie studios' claimed rights of access control break the constitutional balance between the copyright holder's limited monopoly and public access to information. What they are claiming, once again, is a patent-like power to regulate the manufacture of players which perform their "access control" process, allowing them to retain control over the use of content they are ostensibly publishing. Constitutional enabling language for both patents and copyrights (in Article I, Sec. 8) grants Congress the power ...

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

This has traditionally been interpreted as restricting the power of Congress to create exclusive rights for authors and inventors in several ways:

- The protection granted must extend "for a limited time".
- The form of protection must be appropriate — authors are granted protections for expressive content of their works, but not functional elements, and inventors protection for functional elements of their inventions, but not expressive content.

- The form of protection granted must in some way promote "the progress of science and the useful arts". Traditionally, authors and inventors have received exclusive rights in exchange for public disclosure, through fair use rights in copyrighted works or the enabling disclosure of a patent application

The access-control right fails the first two of these tests flat — there is no time limit; more strangely, in this case, we have authors (copyright holders) claiming an exclusive and perpetual right to the functional elements of a "process or treatment" which is applied to their work — clearly an invention.

5.7 Abuse of paracopyright

Lastly, even if we accept that studios have been granted a patent-like right to control the implementation and use of CSS, in perpetuity, the courts have long held that there are limits to the scope of such grants, based on a long history of jurisprudence which states that in order to fulfill its Constitutional purpose, the monopoly grant provided by laws is limited tightly to the actual intellectual property.

The basis of this jurisprudence is not the antitrust laws, but the Constitution itself. Indeed, as the Supreme Court ruled in Morton Salt (quoted below) the question of antitrust violation `per se` is irrelevant; what matters is the public purpose underlying the intellectual property grant. Morton Salt stated this rule for patents; several circuits have extended the principle to copyrights; it is clear that similar limits should apply to whatever new "paracopyright" rights were granted by the DMCA. And in already tying CSS to mechanisms like region coding — a mechanism whose explicit, designed purpose is restraint of trade between the regions — the studios are clearly exceeding the bounds.

The studios' representatives admit and relish the tying between movies and players, as the numerous quotes about "authorized" and "licensed" players clearly show; the whole purpose of the CSS licensing regime is to impose restrictions on the players. As Mr. Marks testified at the LOC hearing:

> Those devices, whether they be players or personal computers or the Sony PlayStation who would like to have their devices be able to display and play back those DVD disks need to get a license to be able to decrypt the CSS encryption system. They do that by going to the DVD-CCA and applying for a CSS license.
>
> That CSS license gives them the keys and tools to be able to decrypt the disks. It also imposes certain conditions on what the device can do with the content once it is decrypted. One of those

obligations, for example, is that the content is not allowed to flow out in the clear on a digital output.

(LOC hearing transcript, p. 242). The collective market power of the movie studios in the DVD market is obvious and undisputed. Through contractual arrangement with the DVD-CCA, the studios have formed a trust which seeks to force an unwanted licence on all prospective members of the DVD player market. This is as obvious a case of tying as one can imagine. The collective force of the trust of all movie studios has subordinated an entirely new technology market under the guise of access authorization.

"First, as to antitrust liability, case law supports the proposition that a holder of a patent or copyright violates the antitrust laws by 'concerted and contractual behavior that threatens competition.' " Image Technical Services Inc v. Eastman Kodak Co, No. 96-15293, (9th Cir. 8/26/97).

The problem becomes clear when we read the statute's requirement for the authorization of "the" copyright owner. Setting aside the "which came first, the access or the device" question, if each studio were to market its access authority independently, no trust would exist and there would not be a problem. However, through collusion the Copyright Act is subverted. The MPAA authorization model provides authority not from the copyright holder of the individual movie, but rather from a single entity which speaks for the entire trust of all movie studios. Copyright holders not acting as part of a trust might disagree on whether and end user could create unencrypted copies for certain purposes. If the MPAA model does not create a trust, how can can authorization be coherently defined when different copyright holders make different determinations on authorization in a common protection scheme.

The industries' desire for standardization cannot serve as the escape hatch here. The true intent of the DMCA was to allow First Sale to be taken for the keys to encrypted works. These keys could easily be placed in a variety of standardized players without the need for a trust that would drive restrictive conditions and expensive prices to all would be player developers.

It is commonplace for encryption algorithms to be openly distribution and yet the keys they use to remain proprietary. In fact, this is the prefered model for the field, because it is widely acknowledged that trying to keep the alogorithm secret is doomed to failure. So-called "security through obscurity" is a "beginners mistake", in the words of the expert witnesses for the defense.

While a violation of antitrust laws is sufficient, it is not strictly necessary for a defense to an intellectual property violation, as argued persuasively in Lasercomb v. Reynolds:

> A patent or copyright is often regarded as a limited monopoly – an exception to the general public policy against restraints of trade. Since antitrust law is the statutory embodiment of that public policy, there is an understandable association of antitrust law with the misuse defense. Certainly, an entity which uses

> its patent as the means of violating antitrust law is subject to a misuse of patent defense. However, Morton Salt held that it is not necessary to prove an antitrust violation in order to successfully assert patent misuse:
>
> "It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity." 314 U.S. at 494. See also Hensley Equip. Co. v. Esco Corp., 383 F.2d 252, 261 & n. 19, amended on reh'g, 386 F.2d 442 (5th Cir. 1967); 8 Walker on Patents, at 28:33.
>
> So while it is true that the attempted use of a copyright to violate antitrust law probably would give rise to a misuse of copyright defense, the converse is not necessarily true – a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of antitrust law (such as whether the licensing agreement is "reasonable"), but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.

Morton Salt expressed the Supreme Court's view on misuse of patents, which Lasercomb translated into copyrights. It is only since the rise of copyrighted computer programs that misuse of copyright has gotten attention. Still, Lasercomb's perspective has subsequently been endorsed by the 5th Cirtuit as well, eg Alcatel USA v. DGI Technologies, No. 97-11339, (5th Cir. 1999). When the Lasercomb standard is take together with that of Morton Salt, a comprehensive statement covering intellectual property can be formed:

The grant to the creator of the special privilege of a intellectual property grant carries out a public policy adopted by the Constitution and laws of the United States, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors ... the exclusive Right ..." to their original works and novel inventions (United States Constitution, Art. I, section 8, cl. 8). But the public policy which includes original works and inventions within the granted monopoly excludes from it all that is not embraced in the original expression or novel invention. It equally forbids the use of the intellectual property grant to secure an exclusive right or limited monopoly not granted by the Copyright or Patent Office and which it is contrary to public policy to grant.

Interestinly enough, the judicial origin of intellectual property misuse is traced by James A.D. White in his article "Misuse or Fair Use: That is the Software Copyright Question" (Berkeley Technology Law Journal 12-2, Fall 1997) to a Supreme Court case strikingly similar to the one at hand.

> The doctrine of intellectual property misuse first arose in the early 1900s in conjunction with the use of patents. In the 1917 case of Motion Picture Patents v. Universal Film Mfg. Co. [243 U.S. 502 (1917)], the patentee licensed its patented movie projector on the condition that the film used in the machine must be purchased from the patentee (a type of tying arrangement). The Court found that:
>
>> [S]uch a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.
>
> In short, the Court denied relief to the patentee because the licensing restrictions attempted to extend the scope of the film projector patent into the unpatented area of film.

The same logic applies to the studios' use of CSS on movies. Were it confined to assuring that the consumer purchased the descrambling key before viewing the work, there might not be a problem. However, just as in Motion Picture Patents, the intellectual property rights to the work are tied not just to the key, but to full blown players which implement additional technology that is not part of the monopoly grant. Further this technology can only be obtained, according to the MPAA, subject to the DVD-CCA licence which contains anticompetitive terms that attempt to restrict end-users from reverse engineering it and prevent public disclosure of the ideas it contains. Both restrictions violate 17 USC 102(b) which forbids copyright protection to "ideas" or "methods of operation".

The reasoning from 1917 is timeless. These restrictions are invalid because a player is obviously not any part of the creation of the intellectual property in suit; because it is an attempt, without statutory warrant, to extend the intellectual property monopoly in this instance movies on DVD, beyond the scope and duration statutorily protected, and because to enforce it would be to create a trust in the licencing and use of DVD players, wholly outside of the intellectual property in suit, and hence beyond the reach of intellectual property laws as the Supreme Court has interpreted them.

5.8 These problems inhere only to the studios' reading

It is noteworthy that the problems discussed above largely go away when the statute is read, as seems clear it was intended, to protect only measures which test whether a user is authorized to view a particular work, and only to the effect that copyright holders can sue if such a test is subverted, not if it is performed correctly by a device which they have not licensed. In this reading, the law becomes reflective of the expressed Congressional intent, not completely at variance with it. And the law is no longer seen as granting exclusive rights over any process to copyright holders. No such grant is necessary to protect legitimate access control; Congress can ban circumvention tools without granting exclusive rights to manufacturers of access controls just as they can ban burglary tools without granting a new form of intellectual property right to locksmiths.

6 Consequences of adopting plaintiffs' reading

We have argued so far that the studios' reading of the DMCA is at odds with the text of the statute itself, with legislative intent, and with the Constitution. However, if they were to prevail in their lawsuit, it would establish a precedent which would, in the long run, be enormously harmful to the public interest. To see this, let us examine what rights the studios are claiming in this case, and consider what similar claims they might make in the future.

6.1 Imposition of arbitrary use controls on work, via license restrictions

To begin with, the movie studios are claiming a monopoly right to vet and approve implementations of the CSS process, a process which is necessary to render the video from any DVD (deriving this supposed right from the notion that CSS is an "access control" process, even though it does no more to check that the viewer of a given disk is in any sense authorized than do any of the other, numerous processes such as MPEG decompresssion which are necessary to achieve the same end). To put the matter simply, it is not possible to build a useful DVD player — one which will render the movies on any of the DVD disks commonly sold in stores — which does not perform the CSS process. (One could build a DVD player which did not do CSS, but it would not render the vast majority of current DVD titles, and would be very little use in the usual role of such a player in home entertainment). So, if the studios succeed in their case, it will not be possible to build a useful DVD player without a license.

And, while the fee for these licenses is (so far!) nominal, and they have been given out (so far!) to anyone who was willing to agree to the terms of the license, there is a catch — namely, the terms of the license, which already impose conditions which many might find obnoxious.

One such condition, for instance, is the implementation of the "region coding" mechanism, by means of which the studios mark certain disks as intended for particular markets, so that a DVD sold in the United States, for instance, is not supposed to be playable in Brazil. Many people (not excepting Americans, who are not supposed to be able to view disks sold in Europe!) might find this to be an obnoxious restriction. Indeed, in Europe, there is already a substantial market for DVD players without region control, and for kits to disable the region control mechanism in DVD players. This region coding mechanism has nothing to do with either access control or copy control, the two nominal rights provided by copyright holders under the DMCA. Yet, the studios are using their supposed right to license the CSS mechanism as a club to force player manufacturers to adopt it.

And there is nothing in the studios' reading of the law to prevent them from imposing even more restrictions on CSS licensees in the future, which, if translated into mechanisms such as region coding, would be translated directly into controls of the use of their works by the consumer. In effect, the studios would have bootstrapped the access control power, which they were given by Congress into a power to control the useof their works, which they were denied. And they would have reestablished the end-to-end control of the chain through which their works are distributed which they lost decades ago in U.S. v. Paramount — they would not directly control the players in peoples' homes, but they would have so much control over what those players were allowed to do that the effect on the public interest would be as severe as if they did.

6.2 Economic control of the player market

Likewise, while the studios are not charging excessive fees or discriminating against potential licensees now, there is nothing in their reading of the law to prevent them from doing so in the future, thereby allowing them to pick and choose among potential licensees. They would have bootstrapped the "access control" power into power to control the design of products which play their works — another power which Congress specifically denied them.

In short, if the movie studios are allowed to impose arbitrary terms in the CSS license, and to require such a license as a condition of legal manufacture of players for their work, they would have acquired a power of enormous scope, of immense value to them, but hugely inimical to the public interest.

7 Conclusion

The law regarding intellectual property protection in the United States has always stressed a balance of interests, between, in particular, copyright holders and the general public. This theme of balance was kept carefully in mind by Congress as they deliberated over and enacted the DMCA — in particular, it is a theme of the Congressional debates, repeated over and over, that the ban on “circumvention” devices would be narrow, would cover only devices specifically designed to grant unauthorized access, and would not cover any device with a legitimate purpose.

The interpretation of the law adopted by the MPAA stands this balance on its head. The movie studios are asserting an absolute right to control the manufacture of *any* machinery which is capable of viewing their CSS-protected works, specifically including the LiViD project, whose sole purpose is in fact producing a player functionally equivalent to those already commercially available for Windows and Macintosh computer systems. And they are already using this power to restrict the options available to the general public (by making players artificially unable to view films from outside “region 1”, the U.S. and Canada), and so to artificially restrain trade. This is not about piracy, it is about control. It should not, and cannot stand.

Mickey McGown

August 4, 2000

The following comments are in response to the request of the Copyright Office regarding Sections 109 and 117. The questions posed by the Copyright Office are in *italics*, while my comments are in **bold**.

1. Section 109

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

"It alters the intended effect of the first sale doctrine by allowing the copyright holder to insist that each subsequent 'owner' obtain a new authorization."

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

"None. It is reasonable to retain proper attribution to the original author."

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

"New technologies do not affect the first-sale doctrine any more than previous technologies."

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

"To no extent at all."

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

"It should not be expanded at all. If the concern is about the original owner keeping a copy after the fact, this is not a new issue. It has always been incumbent upon the individual to follow through with their obligation."

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

"No. It is not the absence of a new law that has affected the marketplace, it is the absence of persons, both corporate and private, adhering to existing law."

1. Section 117

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

"The fair-use privileges granted by US Code, Chapter 17, Section 117(a)(2) can be criminalized at the whim of the copyright holder. There appears to be no limit to the interpretation of what is covered, ranging from simple archive viewers to tamper-resistant fasteners to complex file formats, even retroactively."

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(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

"None."

(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

"Section 117 is not premised on technology. However, copy-protection methods have grown more complex, making the individual work harder to retain fair-use privileges. Anti-circumvention legislation now makes it a legal minefield."

2. General

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

"I am concerned that the prohibition on circumvention of technical protection measures (TPM's) effectively creates a new class of intellectual properties, one that I am not allowed to study. It is not a copyrighted work, because that is what is being protected. It is not a patented work, because it would have been disclosed. It is not a trade secret, because it is prohibited to be independently discovered. This new class of works has a vague definition, which allows it to be applied to a wide variety of situations in ways that I don't believe were intended, and I am restricted from examining these new works even while asserting my section 117 privileges."

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

"Yes, but only if that hearing has the jurisdiction to urge repeal of the prohibition of circumvention of TPM's, or has the effect of exempting all classes of works from the prohibition. If I can further this cause by my participation, I would be honored."

Thank you,

Mickey McGown
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Bryan W. Taylor

Comment in Response to the Copyright Office Request for Comments on Sections 109 and 117 of the Copyright Act (June 5, 2000)

Federal Register: June 5, 2000 (Volume 65, Number 108)
Notices - Page 35673-35675

LIBRARY OF CONGRESS
The United States Copyright Office

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

This comment is filed by Bryan W. Taylor, an American citizen, as a private individual.

I would like to express my gratitude to the Copyright Office for affording the public the opportunity to provide input.

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INTRODUCTION TO FIRST SALE AND THE DMCA

The Digital Millennium Copyight Act (DMCA) creates a new right to authorize access to copyrighted works when technological protection measures (TPM's) are used. The new law, however, is silent on critical questions that are answered for the other rights given to copyright owners. Specifically, there are at least two interpretations of the statute that are consistent with its text regarding the relation of the new right to authorize access to First Sale. One interpretation obliterates the doctrine of First Sale and has serious antitrust implications, while the other strengthens First Sale and preserves the balanced relationship between authors and the public.

In a nutshell, one interpretation of the DMCA finds copyright holders in possession of two distinct rights, which can be sold separately. These are the right to vend copies and the right to authorize access. This interpretation would treat the new right to control access as if it were equivalent of the exclusive rights in 17 U.S.C 106 (though it is not listed there). The sale of the rights in 106 can be transferred separately. If access control is treated this way, then the doctrine of First Sale has been replaced with the doctrine of "First and Second Sale" since both access and copy are needed for use.

Moreover, by design, a dangerous tying arrangement would be created between the two. This tying arrangement is not one of speculation. Indeed, it is being used in the marketplace today by the DVD-CCA to claim rights to a "Third Sale" with the collective market power of the movie studios forcing the product on would be DVD player developers. There simply is no right to control players, which are distinct from encryption keys. The use of the market power of the studios to force player technology to the entire player market is in utter contempt for the DMCA statue, Congressional antitrust legislation, and the public.

An alternate interpretation of the DMCA is that the right to authorize access control is not listed in 106, and therefore must not be treated as such. Rather, like every other aspect of control over use not covered by the exclusive rights of section 106, control is transferred when the just reward is collected in the market place. Under this view, access authority is inherently transferred at First Sale, along with a lot of other rights.

Congress simply failed to put anything textual in the law that decides between these two alternatives. Obviously, studios and publishers, true to their long standing history, seek every bit of control that they can use to milk money out of consumers and prefer the first model. Consumers, academics, scientists, and librarians, true to their long standing history of seeking every bit of knowledge possible to advance the progress of science and arts, obviouslyprefer the second model.

The question, simply put, is how should the Copyright Office interpret an ambiguous statue that can reasonably be read two mutually incompatible ways. Fortunately, a long line of Supreme Court decisions provide the answer. In fact, direct guidance on the question of how to resolve ambiguity has recently been offered by the Supreme Court in the holding of Sony v. Universal Studios:

> The protection given to copyrights is wholly statutory, and when Congress has not plainly marked the course to be followed, the judiciary must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests.

Thus the answer to the question of how to pick between different interpretations is clear: circumspection is required if the granting of rights to the copyright holder is not "plainly marked". This result requires that ambiguity be resolved against the copyright holder. The granted monopoly inherent in intellectual property must never be extended beyond the limits of it's specific grants. When the limit is fuzzy, we must err on the side of caution. This is settled law.

The holding in Sony is no accident. In fact, the connection to prior jurisprudence is provided in footnote 13, which is quite telling:

> While the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent. See, e. g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 - 158 (1948) (copyright owners claiming right to tie license of one film to license of another under copyright law); Fox Film Corp. v. Doyal, 286 U.S. 123 (1932) (copyright owner claiming copyright renders it immune from state taxation of copyright royalties); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349 -351 (1908) (copyright owner claiming that a right to fix resale price of his works within the scope of his copyright); International Business Machines Corp. v. United States, 298 U.S. 131 (1936) (patentees claiming right to tie sale of unpatented article to lease of patented device)."

Thus the Sony decision is no accident, but the consistent application of a century of careful consideration.

The legislative history of the DMCA finds much disapproval for the concept of the 'pay per use' society. It is difficult to imagine how this can be reconcile with the "First and Second Sale" model. The right to control access, if it is not transferred at First Sale, will inevitably lead to repeated sales for access. This requires little more than incorporating a counter into the TPM so that different keys are required every time. It will not take long for publishers to realize that if they can collect twice they can collect repeatedly. Thus "First and Second Sale" will be replaced by "First and Second and Third and ... Sale".

The real purpose of the DMCA is not to allow copyright holders to have expanded power to collect repeatedly from hapless consumers. Instead it is merely to create another alternative way to collect that is compatible with e-commerce. By using encryption, the work can be securely transmitted separately from the key. The DMCA creates a way for copyright holders to take their just First Sale reward by selling EITHER the copy or the key.

By allowing this new model, the burden of network based commerce is greatly eased. Encrypted copies can be freely circulated, without concern for endless copying of useless cipher text. Then, when a buyer is found, the minimum amount of data need be exchanged: a credit card number for a key. An example of the DMCA in action, preventing copyright holders from losing the fruit of their labor without being compensated is provided by Real Networks v. Streambox. Unlike the DVD cases, Streambox users have no claim of access because they have not paid First Sale.

There is a truly frightening claim that is being advanced currently by movie studio plaintiffs, but it is not one that can be reconciled with the statute. It is clear that Congress intended authority to access to be conferred through the application of information with the authority of the copyright holder. This is found in the definitions of 1201(a)(3):

> As used in this subsection -
>
> (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
>
> (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

The key used for decryption is the quintessential example of such information. A monopoly to profit once from such keys is all that is granted.

The movie studios in the controversial DVD cases claim that beyond just first and second sale, that they have an exclusive right to authorize players, the programs that apply the key. Thus, they believe that in addition to the First Sale of the DVD, and the Second Sale of the player program, that if you want to create a player you must buy authorization through "Third Sale" in the form of $10,000 to the DVD- CCA.

In order to sustain this claim, one must infer from the statutory prohibition on distributing circumvention devices, that a right to authorize players exists. This simply isn't found in the text. A statutory prohibition is not the creation of a right for a third party. In fact the only authority created is done so in the text of 1201(a)(3) above. Here it is clearly seen that the only authorization given to the copyright holder is over the application of access information and the act of descrambling.

From this, the movie studios would have us believe that they have been given total control of the entire DVD player market. The technology license they sell grants a copyright license to the software it protects and allows appropriation of the certain trade secrets under a confidential relationship, but it certainly cannot create a new form of super-intellectual-property that protects ideas without a patent's disclosure requirement and as a copyright simply cannot do.

The studios are clearly making a play for the "absolute control" decried by footnote 13 in Sony. This is not surprising however, since if you include the Sony decision itself in the tally, 3 of the 5 decisions describe abuses by movie studios. DVD's are just another episode in a long history of intellectual property abuse by movie studios. Actually, the Court left outanother significant case from it's list: Motion Picture Patents v. Universal Film Mfg. Co. 243 U.S. 502 (1917). The facts of that case are eerily similar to those of the DVD situation.

It is difficult to identify any idea that the Supreme Court hasrebuffed so repeatedly as the movie industry's overly aggressive interpretation of intellectual property rights. Movie industry credibility on copyright should be treated like the tobacco industry on health matters: listen to what they say and believethe opposite.

Normally, one would expect a Federal Judge to identify such clear overreaching. The collective market power of the MPAA studios bears down on the DVD player market, forcing an unwanted license down the throats of any would be competitor. The violation of antitrust laws, and the misuse of intellectual property are so obvious it shocks the conscience.

Sadly, the judge in the New York DVD case refuses to recognize these arguments, but, as he admits, his former law firm was responsible foradvising Time Warner on DVD antitrust matters while the Judge practiced there. Despite this, Judge Kaplan refuses to recuse himself. No reasonable person could expect such a judge to repudiate the prophylactic antitrust work of his former firm without suffering a conflict of interest. The recent precedent in Panama v. American Tobacco Company, No. 99-30685 (5th Cir. 7/20/2000) on a very similar recusal situation only confirms that the judge should have stepped down. Fortunately, the integrity of theprocess the Copyright Office has been using is beyond reproach.

For the above reasons, I urge the Copyright Office to use it's rule making and influence to advance the progress of science and the arts by rejecting the notion of "First and Second Sale". Moreover, I urge that CSS encrypted DVD movies specifically be defined as a "class of works" for exemption status under 1201(a)(1)(B). Finally I urge the Copyright Office to declare that applying DVD "title keys" obtained from the DVD media constitutes"application of information with the authority of the copyright holder" so that any device that does so is noncircumventing in accordance with the First Sale doctrine.

ANSWERS TO SPECIFIC QUESTIONS

1. Section 109

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

> Depending on the choice of interpretation of the DMCA, First Sale has either been obliterated or it has been strengthened.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

Electronic commerce, combined with encryption technology, afford a new and more efficient model for copyright holders to take their just reward in the market place: easy distribution of digital encrypted works over the internet, with independent payment for access: trading a credit card number for an encryption key.

(d) What is the relationship between existing andemergent technology, on one hand, and the first sale doctrine, on the other?

New ways of doing commerce have and will continue to create more efficient ways for copyright holders to trade their intellectual property. The First Sale doctrine should continue to apply to assure that the point when rights are transferred is the point of sale.

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The first sale doctrine is simply thequid-quo-pro that the public, through Congress has offered to authors for access to their work. Authors are allowed, for limited times, to extract from the public domain and to obtain a one time reward for providing access to the fruits of their intellect The distribution method or media is totally irrelevant to this.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

New technology does not alter the premise upon which First Sale is based, but it does seem to offer movie studios and other would be copyright abusers a continual supply of new ways to try to abuse the public's generosity in offering copyright protections.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

There is no need to link First Sale to the ownership of the copy. Using encryption, First Sale can be tied to the transmission of an encryption key. The resulting efficiency improves advancement of science and arts by making it easier for the public to provide authors with a one time reward.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

The digital First Sale doctrine is the same as it was prior to the DMCA. All that has changed is that the encrypted work may be distributed independently of money changing hands when an encryption key locks it.

Bryan Taylor

American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association

Before
The Library of Congress, The United States Copyright Office
and
The Department of Commerce, National Telecommunications
and Information Administration
Washington, D.C.

Inquiry Regarding Sections 109 and 117) Docket No. 000522150-0150-01

Comments of the Library Associations

We file these comments to the Copyright Office's Inquiry on behalf of five major library associations, the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association (the "Libraries"). These associations represent the interests of tens of thousands of libraries, librarians and institutions, as well as their public and private patrons.

Section 104 of the Digital Millennium Copyright Act ("DMCA") directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to submit a report to the Congress by October 28, 2000, evaluating the effects of the amendments made by title 1 of the Act and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections.

The Libraries believe there are unsettling trends undermining the Constitutional and legislative balance between incentives to create works and the public access to ideas and content that require federal review and action. Consumers obtaining digital works are routinely required to assent to contract terms that require waiver of long-standing limitations on the exclusive copyright rights, including the first sale doctrine, fair use and preservation. While copyright policy supports a digital first sale doctrine, the current state of the law post-DMCA permits diminished use of the doctrine, impeding the free flow of information and libraries' ability to provide public access to digital works. The Copyright Office should use this inquiry as the platform from which to urge Congress to take meaningful steps to clarify the terms of a digital first sale doctrine to ensure that state laws and contractual terms that unduly restrict the rights of information users do not preempt federal copyright policy.

Introduction: The Role of the First Sale Doctrine In U.S. Copyright Law

The balancing of incentives to create and provide public access to ideas and content is fundamental to U.S. copyright policy. *See, e.g. Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The Constitution empowers Congress to enact copyright legislation for the specific purpose of "promot(ing) the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8. Pursuant to that public purpose, the Copyright Act grants to authors the exclusive right to distribute copies of their work, 17 U.S.C. §106(3), but limits that right by distinguishing between ownership of a copyright (the bundle of exclusive rights granted an author) and ownership of a copy (the tangible material in which a work is fixed), 17 U.S.C. §202, and by extinguishing the copyright owner's distribution right upon the first sale of each copy, *see* 17 U.S.C. §109. Of course, no copyright exists in government works, nor in facts or data.

The limitation of the distribution right to the first sale, as codified in Section 109 of the 1976 Act, was intended to continue the first sale doctrine established by decisions under Section 27 of the 1909 Act.[1] The treatment of the first sale doctrine by U.S. courts has consistently reflected the belief that the public benefit derived from the alienability of creative works outweighs the increased incentive to create that would stem from granting authors perpetual control over copies of a work. *Burke & Van Heusen, Inc. v. Arrow Drug*, 233 F. Supp. 881, 884 (E.D.Penn. 1964);[2] *Blazon, Inc. v. Deluxe Game Corp.*, 268 F. Supp. 416, 434 (S.D.N.Y 1965) (quoting Nimmer, Copyright, §103.31 at 385 (1963) for the proposition that "[after the first sale], the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation."); *See, e.g., C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 191 (N.D. Tex. 1973) (same). The balancing approach to the doctrine was recognized by the Supreme Court early this century. *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).[3] The Libraries believe that recent developments surrounding distribution practices involving digital works undermine this constitutionally crafted balance.

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[1] *See* Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill 28-29 (Comm. Print 1965) (submitted by Register of Copyrights) reprinted in 4 Omnibus Copyright Legislative History (George S. Grossman ed., 1976) (clarifying that the distribution right would not prevent an owner of a lawfully made copy from selling, lending, renting, giving, or destroying the copy). *See also* Act of Mar. 4, 1909, ch. 320, §41, 35 Stat. 1075, 1084 (stating that "nothing in [the Copyright Act] shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."). The doctrine is said to have its roots in the English common law rule against restraints on alienation of property. *See, e.g.*, H.R. Rep. No. 98-987 at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 2898, 2899.

[2] In Burke & Van Heusen, a copyright proprietor attempted to restrict use of records containing its copyrighted musical compositions to promotional distribution in conjunction with shampoo sales. *Id.* at 884. The court held that the defendant's sale of the records independent of shampoo did not infringe the plaintiff's vending right, because receiving proceeds from the initial sale of the records completed the plaintiff's reward under the copyright statute. Id. at 882. Beyond that reward, the plaintiff enjoyed "no further right of control over the use or disposition of the individual copies of the work. Id.

[3] In Bobbs-Merrill, the plaintiff owned copyright in a book, copies of which were printed with the following notice: "The price of this book at retail is one dollar net. No dealer is licensed to sell (the copies) at a less price, and a sale at a less price will be treated as an infringement of the copyright." Id. at 341. Notwithstanding the notice, the defendant sold the books at retail for eighty-nine cents. Id. at 342. The Court rejected the plaintiff's copyright infringement claim, holding that the while the vending right

Questions Regarding Section 109

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

The DMCA's enactment of prohibitions on circumvention places criminal penalties on top of contractual restrictions, thereby increasing publishers' ability to control access to works. The public, which enjoys use and lending rights with respect to works that were subject to the first sale doctrine because they were purchased outright, now faces licensing and legal barriers to private as well as public lending and use. While content owners contend that technological measures merely control unlicensed access and prevent piracy, as the Libraries explained in comments and testimony in the Section 1201 rulemaking proceeding, many measures currently in use or development blur control over initial access with control over library lending and fair use practices such as viewing, reading, extracting, copying and printing. These measures may also allow copyright owners to control use and disposition of copies of digital works long after the copyrights have passed into the public domain. The same concern applies to those who seek to regulate access to digital versions of government works . This unlimited control is contrary to the core principle of the first sale doctrine.

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protected plaintiff's multiplication and sale of his production, the right had been exhausted when the plaintiff sold copies of the book "in quantities at a price satisfactory to it." Id. at 351.

America's libraries have long been among the nation's largest volume-purchasers of copyrighted works.[4] Libraries and their staffs are also diligent law abiders. They understand and adhere to the balance that the Constitution and copyright law have struck between the rights of copyright owners and users. However, recent adoption of legislative changes in the DMCA has reinforced a view of the legal environment that makes sharing of certain digital works suspect. It must be stressed that from the Libraries' perspective, fair use, preservation and the first sale doctrine are as important in a digital environment as they are in the print world.

Technological measures, augmented by the threat of criminal sanctions for circumventing those measures, permit publishers to control uses in new and unprecedented ways. Publishers can now block a lawful licensee's access to digital content by activating a control and device embedded into the code. While the law prohibits sale of devices designed to circumvent technological protections, and certain individual practices will be prohibited commencing October 28, 2000, the mechanisms may be activated without regard to whether the conduct at issue is infringing. License restrictions on what would ordinarily be fair use, permissible dissemination under the first sale doctrine or allowable preservation, may ultimately be enforced through these measures. Moreover, one patron's misuse may be used as the pretext for foreclosing access not just to the offending individual but to all authorized users, to the public's detriment. For example, one university recently had several services turned off by the vendor because of "unusual patterns of use" (i.e., excessive searches and downloads) by one individual.

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[4] According to surveys published in 1998 by the National Center for Education Statistics (U.S. Department of Education), the 8,891 U.S. public library systems alone spent $789 million on library materials, including electronic formats, in 1995. The 3,303 U.S. academic libraries spent $1.3 billion on information resources in all formats in 1994. These libraries now spend well over $2 billion.

Technological measures also impact on a library's ability to implement customized systems for ensuring compliance with license terms. When works are owned outright and are subject to the first sale doctrine, a library is able to exercise managerial discretion over the lending and use of its materials. In a publishing world dominated by digitally controlled works, libraries are forced to comply with one-size-fits-all technological enforcement measures that sometimes result in delays and diminished access by patrons. For example, access controls based on shared passwords have already proven problematic for some libraries. According to one university librarian, "We have gone to great lengths to organize and maintain a myriad of passwords to give to off-campus users. Passwords are getting to be a nightmare; I have pages of them." Licenses that limit access to students registered at a university, for example, may also impede full utilization. These licenses are frequently administered according to users' domain names, which may prevent libraries from making works available to visiting professors, scholars and community members with access to the library. Distance education users who are covered by the license but who attempt to log in from distant IP addresses also face severe and often impassable technological hurdles.

Technological measures that limit the machines from which a digital work can be accessed are another common impediment to full utilization of licensed resources. A recent survey by the Libraries of the impact of technology disclosed that many databases are available on only one computer in a library, which means that only one user can dial in at any given time. For example, the *Nature* web site bundles together several journals online that are password protected. Only one individual can use the site at any given time. This means that even though all the journals were lawfully acquired, a single patron using just one of the purchased works effectively blocks use of all the other journals available on the site. In the print format, each issue could be simultaneously used by separate users. There is no copyright rationale for preventing multiple users from accessing different journals at the same time, yet the technological measure and prohibition on circumvention of that measure enforce the restriction.

The blurring of distinctions between lawful access and use was not the intent of Congress when it passed the DMCA's anti-circumvention provisions. The DMCA and its legislative history indicate that the prohibitions were not to affect other rights, remedies and limitations in the Act. *See* 17. U.S.C. §1201(c)(1). However, any reservation of these rights is moot if it remains illegal for a library or a user to circumvent technological measures in order to use the underlying works in ways that have traditionally been permitted under the first sale doctrine, fair use and preservation. In light of these developments, the Libraries urge copyright reform to reaffirm and assure their ability to lend digital works in the public interest and to facilitate uses of those works that are consistent with traditional copyright law principles.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

Copyright Management Information ("CMI") technologies such as "digital watermarks," "digital signatures," and "digital object identifiers" do not by themselves prevent access to a digital work, but they do give content owners an unprecedented ability to track ongoing use of digital works. Despite Congressional efforts to protect privacy in the DMCA, CMI technologies allow publishers to monitor who is looking at a work and exactly what the users are doing with it. Deployed in conjunction with access controls, CMI technologies impose unprecedented limits on and accountability for a library's ability to lend and make fair use of lawfully acquired digital works.

Digital publishers now have the ability to manage the kind of day-to-day operational decisions that were previously within the discretion of libraries. Previously, as owner of a particular copy of a book, a library was entitled to set the terms of patron access to that copy; as licensee of a digital work subject to technological measures, the library may be denied such right. The inability to establish uniform usage procedures will become increasingly problematic as the number of licensed works proliferates. Libraries are already finding it difficult to keep track of and interpret varying contract terms. In light of the accountability imposed by CMI and the criminal sanctions associated with circumvention, many individual librarians are understandably reluctant to make the fair use judgment calls that previously were standard management decisions or expose patrons to the new sanctions. Where uncertainty about permissible use exists, liability concerns may lead librarians to forego uses that are actually permitted under license and the law. According to one university librarian, "Technological devices such as watermarking have affected interlibrary loan, class reserve, and classroom use in the application of fair use. Electronic journals are still available in print versions so interlibrary loan and reserves are still possible. But when publishers start eliminating print versions, such electronic restrictions will be a significant problem unless electronic versions are treated just as print versions where fair use applies."

The combination of technological measures and CMI systems also gives information publishers an unsettling ability to track individual intellectual inquiry in ways that would not have been permissible traditionally under the first sale doctrine. To the extent that the first sale doctrine ensures individuals' and libraries' right to share and lend lawfully owned copies of a copyrighted work, the doctrine facilitates the exchange and intellectual collaboration that is central to the First Amendment "marketplace of ideas." Mindful of the accountability imposed by CMI, libraries are asked to comply with licensing terms that effectively restrict the time, place, and duration of private intellectual engagement. Intellectual inquiry is especially threatened when CMI technologies are deployed in conjunction with access blocks. According to one library system: "Some journals from the American Chemical Society request that they be allowed to send 'cookies' to users' workstations to monitor use. When users refuse this invasion of privacy, they are denied access at their workstations even though the organization has a subscription." Even though the definition of CMI in the DMCA specifically excludes "any personally identifying information about a user of a work or of a copy," 17 U.S.C. §1202(c), the way CMI technologies are actually implemented chills use of a library's digital resources for research in areas where anonymous inquiry and the absence of a digital trail are critical. Of course, this chill can affect not only scholarly researchers, but more broadly faculty, students and the general public.

America's libraries have always had the right to allow their patrons to enter the library's facilities, access works lawfully owned by the library, and use those works, often anonymously, as allowed by copyright laws.[5] Copyright law has never meant that publishers can control who looks at information and whether a page can be copied for private use. Now, increasingly sophisticated technological measures and private licenses between parties with unequal bargaining power threaten to curtail the abundant access to information and private intellectual inquiry that American libraries, both public and private, were founded to facilitate. While the exact nature and extent of the detrimental effects remain unclear at this time, the need for a full understanding of the interaction between CMI and first sale, on the one hand, and privacy rights on the other, is increasingly apparent. As with other developing aspects of technology and privacy, legislative analysis and action are needed to avert adverse effects.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

In the past decade, electronic distribution has grown into a dominant method for publishing many kinds of copyrighted works. As a general proposition, owners of copyright in digital works distribute these works by licensing usage rights rather than selling physical copies of the copyrighted work. Because the first sale doctrine codified in section 109 of the Copyright Act applies only to lawfully owned copies of a copyrighted work, some suggest this statutory limitation on a copyright owner's right to control distribution of a copyrighted work beyond the initial sale of copies is inapplicable to licensed works. As a result, many digital licenses are able to—and do—restrict both the resale and lending of digital works and the licensee's ability to use lawfully obtained copies in ways that have traditionally been permitted under fair use, the first sale doctrine and the rules of preservation with regard to analog works.

The Libraries have found that licensing rather than selling digital works has allowed content owners to implement a price and market discrimination business model

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[5] Indeed, many states have laws prohibiting libraries from revealing circulation records.

which forces libraries to choose between second-class, but affordable products and more expensive digital versions. To the extent that "deluxe" digital versions feature content and search mechanisms not available in lower-priced formats, libraries' limited budgets threaten to exacerbate the "digital divide" between those who have access to electronic information services and those who do not.

Where libraries are able to afford access to digital products, licensing terms routinely affect uses that were traditionally lawful under the first sale doctrine. Routine library practices permitted under copyright law, such as interlibrary lending, lending for classroom or at-home use by patrons, archiving, preservation, and duplication for fair use purposes, have all been restricted – in some cases severely restricted and in other instances barred – by licensing agreements. Alternatively, in some instances, sharing of digital works may be made only upon payment of additional fees. Loss of access to digital works for these purposes also promises to increase the information-access gap between the rich and the poor. The Libraries' recent inquiries to members and others has determined that:

1. Interlibrary lending of digital works is threatened by restrictive practices

Because digital products are costly and library budgets are limited, few facilities can afford to acquire access to all the digital works that are likely to be sought by patrons. Interlibrary lending has traditionally enabled libraries to borrow from each other's collections on behalf of patrons seeking access to material that is unavailable in the patron's local library. The practice is often prohibited by the licenses under which digital works are acquired. Public libraries in communities with limited resources - whose patrons are among the least able independently to purchase access and among the least likely to have direct access to other publicly accessible collections, such as at public colleges and universities - have traditionally been the most dependent on interlibrary lending. Accordingly, these libraries are the most disadvantaged by the containment of interlibrary lending of digital works. Librarians around the country have provided detailed commentary on the loss of this lending right:

- "We will not be doing any ILL [interlibrary lending] to other libraries using online journals. Since we have dropped many print journals in favor of online only, libraries that have depended on us for our unique collection will have to go elsewhere."
- "Most licenses do not cover inter-library loan privileges, and must be negotiated. While we are able to ILL anything from our print collection, publishers are reluctant to extend that provision to electronic material."
- "We are not allowed, and do not practice, interlibrary loan of materials that we [license] in electronic format, which means that if we no longer hold a print copy, we are not able to provide interlibrary loan to things that we purchase rights to."
- "The terms for some products are unacceptable or cost prohibitive, and we have not licensed these products, so our users do not have access. Unlike printed books or journals, digital products are generally not available through inter-library loan and often there is no print equivalent. Since there is seldom a method for a single user to access the digital products the library does not license, these products are essentially unavailable to our users."

Restrictions on interlibrary lending can be devastating to scientific and medical interests. As one academic medical library recently reported:

- "We recently had difficulty obtaining an article from the *European Journal of Surgical Oncology* for one of our users on interlibrary loan. Two libraries were not able to supply the article because they only had the electronic copy of the journal and the license does not allow interlibrary loan use. We were finally able to obtain the article from the National Library of Medicine. Obviously, whoever requested the article was made to wait longer for receipt of information that may have been important for patient care or research."

Even where licenses permit some interlibrary lending, lack of staff and expertise in interpreting contract terms may make the practice impracticable. One library system recently reported:

- "The mish-mash of licensing terms has simply made inter-library loan of digital materials impractical for us to provide—to the detriment of users around the globe with whom we otherwise share scholarly material. We have hundreds of contracts with different e-journal and full-text vendors with different terms governing inter-library loan. Some of our licenses do permit us to print out the digital text and loan the printed version. However, because of the complexity of these terms, the high volume of inter-library loan that we do, and the low-paid short staffing in our interlibrary loan department, we have had to resort to the practical expedient of simply not providing any inter-library loan of digital materials."

Interlibrary lending is a vital aspect of our educational system. Acquired digital works should have the same status as their print and analog companions when it comes to library loans. The first sale doctrine should be clarified to ensure that core federal copyright principles associated with interlibrary lending are guaranteed regardless of format.

2. Licensed Digital Works are the Equivalent of "Chained Books," Often Unavailable for Classroom and Offsite Use.

Lending a lawfully purchased copy of a work for classroom and offsite use has historically been within the discretion of libraries under the first sale doctrine. As teachers and patrons increasingly seek digital works for these purposes, the impact of usage limitations imposed by licenses has become apparent. Many digital works agreements limit access to one specific computer terminal, causing one librarian to liken licensed digital works to "chained books" that can only be read at a specific table. Other librarians share frustration with such limitations:

- "There is an ongoing, unresolved problem between desire to provide access to material and technical service's concern with signing restrictive site licenses."

- "Some vendors/publishers have been very reluctant to permit access to their databases from off-campus .... Some publishers have instituted pricing policies which penalize libraries for offering access to off-campus users. This restricts what we are able to provide for distance education and what is available for students and faculty in their local residences."

- "The proportion of contemporary culture and communication in electronic format is increasing rapidly. Loss of ability to "clip" or "Xerox" bits of video, music, and electronic-only publications limits what students and faculty could take to class when most media in our collection were print or LP records."

Copyright law should provide an explicit right to use all works in a school's library in classrooms within that institution, whether the works are in digital, analog or print format. Off-campus uses by enrolled students and faculty should also be explicitly allowed as a corollary to the first sale doctrine.

3. Licensing Provisions That Preclude Rights Traditionally Available Under The First Sale Doctrine Threaten A Digital Future Without Access to History

Under Sections 107, 108 and 109 of the Copyright Act, libraries are able to archive lawfully purchased works for future use and historical preservation. They are also now explicitly authorized to convert particular copies of a work into new formats (for instance by scanning print works into microfilm and digital formats) to ensure against loss of access as technology evolves and playback equipment becomes outmoded. As libraries obtain more electronic products under license rather than purchase, they are losing control over archiving and preservation, because many licenses prohibit copying digital works for archival or any other purpose, and because the prohibitions on copying are enforced by technological measures. Where they were once the foremost guardians of America's public domain literary heritage, libraries are finding themselves increasingly at the mercy of publishers' abilities and commercial incentives to archive.

From the Libraries' perspective, works that exist only on content providers' servers may be subject to corruption, sabotage, subsequent alteration and selective preservation. If digital works are not archived in a professional manner (appropriate storage media, care and environmental maintenance, adequate indexing, etc.) the risk of loss to authors and society is enormous. There are no firm statistics on losses because the transition to digital publishing is still in the relatively early stages, but it is entirely likely that profit-motivated publishers will not invest in archiving older works that may no longer be marketable on a large commercial scale. Indeed, libraries are already finding that subscription services do not always maintain older works. The PALS network subscribed to by one college library recently dropped its 1993 full-text database, leaving the library without access to those works.

Libraries have also expressed concern that they will lose access to digital works in the event that publishers merge, cease operations, or decide not to convert existing works into new formats as technology evolves. As one librarian explained, "Under the terms of purchase we are generally not permitted to make copies, and as these media are damaged or deteriorate the information is simply lost to humanity. Often the companies are no longer in business, and when they are still in business they frequently no longer have this older material in stock. It might as well have never existed."

Mindful of the uncertainty, libraries are often forced to trade off between current and future interests. One academic medical librarian explained: "Our users are demanding electronic products and we cannot afford to maintain both print and electronic products due to cost considerations. We are unsure of the permanence of electronic products and our ability to have archival access to electronic publications. When we license an electronic journal, will we be able to access an issue 20 or 30 years from now as we can with a print journal?"

Libraries around the country echoed these concerns:

- "Archiving of e-journals is generally not permitted by license. Print journals are generally available, but do not include value-added supplements (video, sound, images) .... An increasing number (of print journals) will become 'electronic only' in future years."
- "Archiving is not possible at all with our First Search and Infotrac. We are dependent on current subscription for access. Theoretically, we have archival rights to keep EBSCO disks and some encyclopedias etc. However, as the interface and computer formats change, using the old disks becomes impractical and eventually impossible because technological and legal restrictions usually prohibit migrating the information to newer formats."
- "Changes in format for technology limits access and use. National Geographic 20 volume set is not compatible with NT network system and is no longer accessible."
- "We try to select our subscriptions carefully, with a view to a long-range subscription with long-standing, reputable companies. ...This is a distinct drawback to licensing versus straight-out ownership."
- "Elsevier has granted electronic access to their journals, but tells us they will only provide access for a 9 month period, so we will lose access to those electronic issues that we once had. We cannot afford their Science Direct product at the moment, which would give us more comprehensive, stable access to their journals."
- "We have had to return tens of thousands of dollars worth of CD-ROMs to vendors like Standard and Poors when our subscriptions ran out, leaving us with no archival data for many years of business information. The price of purchasing this archival information in another format is prohibitive. The data is simply no longer available to the economists and MBA students on our campus."
- "In just [one] week ... we had to withdraw and discard 75 titles that were on older computer disks because we were not sure if we had the rights to transfer them to more current media. With millions of items to keep track of and short

> staffing, we simply cannot devote the staff resources to researching the rights of every title in order to know if we can preserve it or not. The practical consequence is that if the publisher or the laws make it difficult for cash-strapped libraries to save this material, it simply will not be saved."

Federal copyright law should ensure that America's libraries have the full legal tools required to preserve bodies of works in digital, as well as analog and print, formats. The 1998 amendments to Section 108 initiated legal support for this effort by removing the "digital" barrier to certain copying and by allowing three, rather than one, copies to be made of covered works. It is time now to review the state of preservation of digital works in a systematic way. The Libraries believe the time is at hand to enable repository libraries around the country to be designated custodians of specific parts America's digital history and supported in that work..

4. Restrictive Licensing Terms and Pay-per-use Models May Hamper Research in the Very Areas Where it is Most Needed.

High prices and limited budgets routinely force the Libraries to acquire digital products subject to license limitations on transactions, usage hours, or the number of simultaneous users. In order to acquire certain digital products, libraries face restrictive terms that effective diminish the use of scholarly works, contrary to copyright policy applicable to print works. To the extent that high prices reflect a lack of competitive information sources, and to the extent that scholarly research tends to build on existing information, restrictive license terms may effectively discourage research in the very areas where it is most needed.

The problem has been confronted even by relatively large and well-financed library systems. In order to schedule access to certain high-demand sources, students and faculty there are "being forced to do research late at night during off-peak hours."

Visiting other schools or asking colleagues at other institutions to provide research assistance has been the only means of accessing certain other sources that the university cannot currently afford.

Scheduling disincentives have already been compounded by cost disincentives at some university libraries. As one librarian explained, "Document delivered articles, for which we pay copyright, are delivered with a technological device that prevents a second viewing or online storage. So, to get the item again, we have to pay again—a situation that doesn't exist when we purchase a periodical in print." As individuals and research institutions face increased financial burdens at every step in the research process, some projects may be discouraged. Licensed access with transactional pricing may well enable current information publishers to maintain perpetual monopolies over the information categories they currently dominate.

Licensing terms that unreasonably burden libraries' and their patrons' use of works acquired by contract rather than outright purchase should be preempted by an appropriate federal digital first sale doctrine.

5. The Lack of a Clear Digital First Sale Doctrine Eliminates Private Donations as a Long-standing source of Library Materials

Libraries have long relied on private donations to add continually to their collections. School libraries and public library children's collections have traditionally been regular recipients of books and audio materials donated by the families of children who have outgrown them. As educational CD-ROMs become more common and more in-demand by students and teachers, the libraries have found themselves confronted with licensing agreements that render them unable to use donated digital works. The result is that public funds are sometimes used to purchase digital works that might have been acquired by donation under the first sale doctrine. This is especially detrimental to Libraries and their patrons in light of the budget constraints limiting libraries' ability to afford costly digital works, and licensing terms that routinely prohibit interlibrary loan as an alternative means of providing patrons with access to digital works. According to one public elementary school librarian, "When the CD-ROM is given to me in its original case--for example, a counting or letter recognition CD-ROM that a child has outgrown--I feel I should be able to accept it if it would be a useful addition to our curriculum. . . . I feel CD-ROMs should be treated like books, and should be able to be legally used by those other than the original purchaser."

Libraries must be allowed to receive donations of digital works without fear of legal reprisal to donor or library.

d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other? e) To what extent is the first sale doctrine related to, or premised on, particular media or methods of distribution? f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The first sale doctrine is neither media-specific nor technology-specific. The rights and privileges that are codified in the Copyright Act are intended to operate as a whole, with "checks" such as the first sale doctrine preventing the remuneration rights of authors from chilling the public access to creative works that is the goal of copyright law. *See generally Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Some argue that current law prevents application of the first sale doctrine to digital works, because the doctrine limits only the distribution right, not the reproduction right, and because use of a digital program necessitates copying it into the hard drive of a computer. The Libraries do not agree. Even though Section 109(a) states that the doctrine applies "notwithstanding the provisions of section 106(3)," (the distribution right), a proper application of Section 109 takes into account fair use and necessary activities incidental to application of doctrine (such as reproduction). See cf. 17 U.S.C. §117 (confirming that an owner of a copy of a computer program does not infringe the reproduction right by copying that program as an essential step in use).

Moreover, the Supreme Court has held that the Copyright Act "should not be so narrowly construed as to permit evasion because of changing habits due to new inventions and discoveries." *Id.* 158 (affirming that reception of an electronic broadcast by a retail outlet did not constitute a public performance under the 1909 Act). When technological change renders its literal terms ambiguous, the Act must be construed in light of its basic purpose. Id. at 157.

The numerous privileges and exemptions that libraries and their patrons enjoy under copyright law evidence the long-standing conviction that the rights accorded by the first sale doctrine are fundamental to the basic purpose of the Copyright Act. Even when the threat posed to the phonorecord and software industries by modern duplication technologies led Congress to prohibit commercial rental of those works, libraries and educational institutions retained certain lending rights that were deemed to serve a "valuable public purpose." H.R. Rep. No. 735, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6539. As explicitly recognized by Chairman Kastenmeier at the 1990 hearings on the Computer Software Rental Amendments Act of 1990:

> [A] bill to change the first sale doctrine . . . is not a modest proposal. It is . . .a major substantive proposal involving a fundamental change in one of the main tenets of copyright law."

Software Rental Amendments of 1990: Hearing Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong, 2d Sess. 2 (1990) (statement of Rep. Robert Kastenmeier) (quoting Prof. David Lange).

During consideration of the 1990 amendments, Rep. Carlos Moorhead noted, "*Legislation to reform the first sale doctrine frequently arises from a collision course between intellectual property law and technological change*." 136 Cong. Rec. H8266 (daily ed. Sept. 27, 1990) (emphasis supplied). Such reform is appropriate, as Congress noted in 1998 by directing the Copyright Office to consider additional changes to the copyright law that might be needed.

The first sale doctrine presupposes that copyright proprietors will realize "a fair return" on their creative investments from the first sale of a copy. *See, e.g., Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F. 2d 847, 854 (2d Cir. 1963) (stating that the ultimate issue in application of the first sale doctrine is whether or not the copyright proprietor has "received his reward," quoting *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942)). When market conditions threaten to undermine incentives to creative production, a re-balancing of owner's rights and user's privileges may be warranted. However, where the author's interests and those of the public conflict, "the public interest must prevail." *See* Register's Report on the General Revision of the U.S. Copyright Law (1961) (explaining the purpose of public interest limitations on author's rights), reprinted in 8 Nimmer On Copyright at App. 14-17.

The piracy rationale that has warranted past modifications to the first sale doctrine may eventually be rendered obsolete by copy control technologies. Until such time as that determination can be made, the increased incentive to digital publishing that may be achieved by restrictive licenses must be balanced against the benefit that the public receives from library lending. Full application of the first sale doctrine requires extending the section 117 "essential copy" rights that currently facilitate use of computer programs to use of digital works lawfully acquired under the first sale doctrine. Certainly, the public interest in ensuring that libraries are able to carry out their mission of providing access to works – to promote the progress of knowledge – requires no less.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

As our survey has shown, vital library services have been diminished by the loss of control over collections that results from restrictions on the application of the first sale doctrine to licensed digital works, so some rethinking of federal policy is urgently needed. We are in the midst of an accelerating transition to digital formats; print versions of some publications currently remain available for uses such as interlibrary and offsite lending which are banned by digital licensing terms. However, these substitutes are becoming less available as users demand the additional content and search mechanisms that are typically available only in electronic formats.

For libraries to serve the informational needs of the American public in the future as effectively as they have in the past, the binding that ties copyright policy embodied in the first sale doctrine (as well as the fair use doctrine and preservation of works) to lending and usage rights must be strengthened with respect to digital works. This Copyright Office study should recognize this fact and recommend changes to Section 109 consistent with the proposals herein. Specifically, a first sale doctrine for the "digital millennium" should include these points:

1. Interlibrary Lending: Fundamental public copyright policy should not permit distinctions in lending based on the format of the work. The Copyright Act should reaffirm and strengthen the rules on interlibrary loans of digital works.
2. Unchaining Works: All works acquired by a library should be available for use in the classroom, regardless of geographic location, and use by enrolled students and faculty, wherever they are located.
3. Preservation: As recently as 1998 when Congress modified Section 108, it reaffirmed the libraries vital role as the preservers of our nation's recorded history. The trends since passage of the DMCA require additional initiatives. One such initiative to ensure preservation of works in digital formats would be creation of a national system of digital library repositories, wherein specific libraries or institutions would be designated as custodians of specific parts of America's digital history and assisted in their efforts to serve as the preserver of these works.
4. Unreasonable Licensing Restrictions: Federal law should preempt state statutes and contractual terms which unduly restrict the access rights all to which all Americans are entitled to with regard to copyrighted works. A unitary federal policy, providing minimum standards respecting limitations on the exclusive rights of ownership (including but not limited to first sale, fair use and preservation) should be established.

5. Donations: Federal policy as expressed in copyright law should encourage donation of works to libraries irrespective of format. Donors and recipients of digital works should not face threats of litigation or reprisals for the generosity of the gift or the willingness to receive.

If the Copyright Office does not recommend and the Congress does not act, many publishers will continue to legislate digital first sale limitations in their stead—by contract—to an end that fails to effectuate the federal policy of balance between the interests of information owners and users. Restrictive licensing of digital works has become the industry standard, and as print sources become increasingly obsolete, acquiescence is the only means by which many users can gain access to the information they need.

From the Libraries' perspective, this practice deprives many libraries of vital control over their collections. Essential library services such as interlibrary lending, archiving, preservation, and lending for classroom and offsite use have been severely curtailed. Digital products are expensive; for many citizens, library and classroom access is their *only* access. Foreclosing that access will exacerbate the "digital divide," which, in our information-based economy, may mean lost productivity for generations to come. Perhaps even more disturbing is the risk to our nation's rich cultural heritage that is posed by the licensing away of the libraries' archiving rights. The profit motive that properly governs the publishing industry simply cannot ensure that today's digital works will remain available to tomorrow's historians, scholars, and scientific and medical researchers.

As the Supreme Court articulated in *Sony Corp. v. Universal City Studios, Inc.*, "The monopoly privileges that Congress may authorize are *neither unlimited* nor primarily designed to provide a special private benefit. Rather, the *limited* grant is a means by which an important public purpose may be achieved." 464 U.S. 417, 429 (1984) (Emphasis added.) That important public purpose – the continued flow of ideas and information – is directly served by the limitations on copyright that Congress has built into the law. However, as the debate over the proposed Uniform Computer Information Transactions Act ("UCITA') has demonstrated, unless an express federal digital policy preempts state laws, content owners will continue to turn to local laws and restrictive licensing agreements as a way of forcing members of the public to waive the very federal rights that Congress reserved for the public – including those rights that flow from the first sale doctrine on which so many library practices depend.

h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

The Libraries believe that the current uncertainty about the application of the first sale doctrine for digital works has and will continue to have a negative impact on the marketplace for works in digital form.

Uncertainty about the extent to which the rights reserved to users by the Copyright Act apply to licensed digital works is currently chilling digital purchases by libraries. The standard licenses by which publishers market digital works prohibit many practices that have traditionally been within the libraries' discretion under the first sale doctrine. These practices, including lending for offsite use and archiving, are vital to libraries' ability to serve patrons now and in future decades.

In the absence of clear legislative guidance, many libraries have taken the "safe" route and continued to purchase print alternatives to digital where those alternatives remain available. These print works generally lack the added content and search capabilities of their digital counterparts, but libraries appreciate that the print versions may confidently be used according to provisions of the Copyright Act with which they are familiar. This is no small factor as the threat of "self-help repossession" by publishers compounds the libraries' concerns about liability for unintentional non-compliance with proliferating contract terms. For these reasons—and because they are eager to purchase more digital works as uniform usage guidelines become available—the Libraries believe that the uncertainty of a digital first sale doctrine has had a significant negative effect on the short-term market for digital works.

The Libraries also believe that the lack of a codified digital first sale doctrine will hurt the market for digital products well into the future, by exacerbating the "digital divide" between those who have access to digital technologies and those who do not. Interlibrary and classroom lending provide many low- and middle-income individuals and communities with their only access to digital works. If restrictive licenses continue to bar libraries from making digital works available through these services, many citizens simply will not develop the comfort with electronic technology that they need to compete as producers in the digital economy. Because marginalized producers are unlikely to reach their full potential as consumers of digital goods, the Libraries believe that reaffirmation of the first sale doctrine extension to digital works will positively impact the future market for such works.

General: Other issues to consider. Would hearings be helpful?

A new copyright debate is raging throughout many state legislatures this year. The issues posed by attempts to pass the proposed Uniform Computer Information Transactions Act on a state-by-state basis, has led those in state governments, unaccustomed to dealing with federal copyright policy, to confront the relationship between copyright policy and contract law. The debate, which fundamentally affects the first sale doctrine and the applicability of particular terms within licensing agreements, backed by strong local laws, to impact on the federal copyright policy, should not be ignored by the Copyright Office in this inquiry. The Libraries believe that no review of the first sale doctrine and computer licensing rules should be completed without the Congress giving serious consideration to a new federal preemption provision affecting these rules.

The Libraries urge that in light of the vital need for a digital first sale doctrine policy, public hearings should be held prior to the Copyright Office sending a report to Congress.

Respectfully submitted,

American Library Association
American Association of Law Libraries
Association of Research Libraries
Medical Library Association
Special Libraries Association

Date: August 4, 2000

Computer & Communications Industry Association

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Re: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act (DMCA)

Dear Messrs. Feder and Joyner:

The Computer & Communications Industry Association (CCIA) respectfully submits these comments in response to the Federal Register Notice on June 5, 2000, concerning the study required by Section 104 of the Digital Millennium Copyright Act (DMCA).

The Computer & Communications Industry Association (CCIA) is an association of Internet, computer, telecommunications, software, and electronic commerce companies ranging from small, entrepreneurial companies to some of the largest in the industry. CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, resellers, systems integrators, and third-party vendors. Its member companies employ well over a half-million employees and generate annual revenues exceeding $300 billion.

The June 5 Notice requests, *inter alia*, comments on the effects of the development of electronic commerce and the operation of Section 117 of the Copyright Act, and the relationship between existing and emerging technology and the operation of Section 117. Our view is that the Section 117's narrow scope has impeded the growth of e-commerce.

I. Section 117 and Computer Programs.

Congress adopted Section 117 in 1980 as part of the Computer Software Protection Act. Congress based Section 117 on language recommended by the National Commission on New Technological Uses of Copyrighted Works (CONTU) in its 1979 report. Twenty-one years ago, long before the advent of the World Wide Web, CONTU concluded that the Copyright Act required relatively few amendments to accommodate computer programs properly. Specifically, CONTU recommended an exception that permitted the making of a copy of a computer program 1) as an essential step in the utilization of the computer program, e.g., loading the program into the computer's hard drive; or 2) for back-up or archival purposes.

In 1980 Congress followed CONTU's recommendations, with one significant difference. CONTU suggested that the exception apply to the "rightful possessor" of a copy of the computer program. Congress, however, replaced the phrase "the rightful possessor" with "the owner" of a copy of the computer program. At first, courts did not place great weight on this word choice, and applied Section 117 to entities that obtained the software pursuant to a license agreement. *See, e.g., Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988). More recently, courts withheld availability of Section 117 from licensees. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). Because almost all software is distributed subject to a license, be it a negotiated agreement or a "shrink-wrap" contract, this recent line of cases in essence has repealed Section 117.

The *MAI v. Peak* decision contained another critical holding: that the temporary copy of a program in a computer's random access memory (RAM) constituted an actionable reproduction under the Copyright Act. This holding is on questionable footing; the House Report accompanying the 1976 Copyright Act states that "For a work to be 'reproduced,' its fixation in tangible form must be 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*.'" (Emphasis supplied.) Nonetheless, *MAI* has been followed by other courts.

These two holdings, taken together, leave the licensee completely at the mercy of the licensor. Virtually every use of a computer program involves the making of RAM copies; and Section 117 does not excuse the making of copies by licensees. Thus, the licensee can use the software it paid for in full only in the manner specifically permitted by the licensor. For example, the licensor can require that the software be maintained only by the licensor's service organization.

II. Section 117 and the Internet.

The advent of the World Wide Web only compounds the temporary copy problem. Even if Section 117 were to apply to all rightful possessors of copies, rather than just owners of copies, Section 117 by its terms concerns only computer programs. It does not refer to other works, such as text, sound recordings, or films. Since the Internet operates by packets of information moving from the RAM of one server to the RAM of the next, the

Internet involves the making of copies that the *MAI* decision considers to be potentially unlawful and Section 117 clearly does not sanction. One court, for example, found unlawful the RAM copy made by a user while browsing a website.

This basic framework of the theoretical illegality of virtually all Internet transmissions has imposed serious barriers on the growth of the Internet. The potential exposure of Internet service providers for activities initiated by third parties led to the lengthy and costly negotiations that culminated in the Digital Millennium Copyright Act's safe harbor provisions. Service providers now often find themselves modifying the structure of their services in order to comply with the safe harbors' complex legal requirements rather than deploying the most technologically efficient solutions. When the activity can not be squeezed into the DMCA's safe harbors, service providers and users alike must really on uncertain legal doctrines such as fair use, copyright misuse, and implied license to avoid legal liability.

Further, foreign jurisdictions have followed the U.S. model of the illegality of Internet transmissions, again leading to costly lobbying with uncertain results. For example, the draft EU Copyright Directive states that "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form…." This provision, in turn, has led to great controversy over the scope of the exception to the temporary reproduction right.

III. Conclusion.

Temporary copying is inherent to digital technology. Unless it results in the making of a permanent copy, or in a public performance or display, the legitimate interests of the rightsholder have not been harmed. Moreover, even if the temporary copy does result in the making of a permanent copy, or a public performance or display, then the copyright analysis should focus on that permanent copy or public performance or display, and not the temporary copy. Treating temporary copies as potentially infringing copies has imposed needless complexity and uncertainty on the Internet. The temporary copy problem in the U.S. would evaporate if Section 117 were amended to include the following language from S. 1146 and H.R. 3048 introduced in the 105th Congress:
"Notwithstanding the provisions of Section 106, it is not an infringement to make a copy of a work in a digital format if such copying --
(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and
(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Thank you for the opportunity to comment on this important matter. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Jason M. Mahler

Vice President and General Counsel
Computer & Communications Industry Association

Patrice A. Lyons

REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT
[Docket No. 000522150-0150-01]

Comments submitted to the U.S. Copyright Office & National Telecommunications and Information Administration
[Comments also available on the Internet at http://hdl.handle.net/4263537/section109]

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Introduction

By Notice published in the Federal Register of June 5, 2000, the U.S. Copyright Office and the National Telecommunications and Information Administration requested public comments relating to an issue that at first blush might seem relatively straightforward: the meaning and scope of section 109 of the U.S. Copyright Law, title 17 U.S.C.[1] The reality is otherwise. Many newcomers to copyright, particularly in the rapidly developing Internet environment, often misinterpret the meaning of this provision in a very basic way. My comments will address, in general, Section 109(a) of the copyright law (1(e), (f) and (g) of the "Specific Questions" raised in the Request for public comment), and put forward a possible theoretical basis for moving forward that will draw on recent developments in the technology for persistently identifying and accessing information expressed in the form of digital objects.

Section 109 & "Copies"

Fundamental to an understanding of section 109 is an appreciation of the meaning of the term "copy."[2] From a legal perspective, this is a much misunderstood -- and misused -- word. Many in the emerging information industries simply view "copy" in a lay person's sense, and are mystified when told that it is defined as a "material object" for copyright purposes.[3] There is an important difference between a copyrighted work, and a physical object in which the work may be fixed. This distinction has important consequences for other sections of the copyright law.

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[1] For ease of reference, citations to sections of the copyright law will be to the informal reprint of the law by the United States Copyright Office, Circular 92 (April 2000).

[2] Section 109(a) limits section 106(3) by generally permitting "the owner of a particular copy or phonorecord lawfully made . . . to sell or otherwise dispose of the possession of that copy or phonorecord." My comments will focus on "copy" and not "phonorecord."

[3] Under section 101, "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now know or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed;" see also, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976). For an interesting recent case touching on the meaning of "copy," see DSC Communications Corp. v. Pulse Communications, Inc., 1999 Copyright L. Dec. (CCH) & 27,886, at 31,272-73 (Fed.Cir. 1999) (discussion of interplay between section 117 and 109).

To illustrate the difference between the general notion of copy and "copy" for purposes of the copyright rights of reproduction and distribution,[4] it is sometimes helpful to use imagery familiar to computer users. My favorite is the image of a "flying toaster" that used to dart across my PC screen while the computer was otherwise idle. With today's technology, there is no way to move a metal toaster over fiber optic cables or fly it to a satellite for transmission to users. There is also no way to send a piece of plastic, tape, paper, or similar physical object over the Internet. No "copy" of a copyrighted work is transmitted over the Internet. This has important ramifications for other provisions of the law, e.g., if no copy is distributed to the public over the Internet, then the mere act of transmission alone would not serve to publish a work.[5] A mere change of terminology to refer to what has been loosely called a "digital transmission" would not appear to change the situation. There would also be no legal requirement for a copyright notice on information sent via the Internet, unless, of course, it had been previously made available in the form of material objects in sufficient amount to satisfy the requirements for publication.[6]

The misunderstanding may stem from the often interchangeable use of the concept of a copy in the sense of a "reproduction" of a work and copy as the *physical object* in which the reproduction may be fixed. Further elaboration on the difference between a reproduction and a copy may clarify the situation. In particular, it may advance a consideration of section 109 and its relevance, if any, in encouraging the creation and dissemination of information goods and services in a networked environment. The Committee Report on section 109 is helpful in this context. For example, the Report provides the following illustration of the meaning of "copy:"

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[4] Among the exclusive rights of owners of copyright set forth in sections 106(1) and (3) of the law are the rights "to reproduce the copyrighted work in copies or phonorecords" and "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;" see e.g. section 201(c) of the law.

[5] As defined in section 101 of the copyright law: "'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication;" see also H.R. Rep. No. 1476, 94th Cong., 2d Sess., 138 (1976) ("any form or dissemination in which a material object does not change hands-- performance or displays on television, for example--is not a publication no matter how many people are exposed to the work").

[6] According to the House Committee Report, a work is "published" if one or more copies or phonorecords embodying it are distributed to the public--that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents--without regard to the manner in which the copies or phonorecords changed hands. Id. at 138.

> ". . .the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. . . .Under section 202 however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent."[7]

Unlike works fixed in the form of a book on paper or as a CD-ROM on a piece of plastic, works such as a game program written in a computer language and made accessible at an Internet site, may potentially be reproduced, performed and/or displayed publicly and otherwise used by millions of users without any payment, or even credit, to the owners of copyright in the work as a whole, or its component parts. Extension of section 109 to such new forms of expression without careful evaluation may have a negative impact on the creation and accessibility of new works of authorship to the detriment of both copyright owners and the public at large.

State Contract Law

The meaning of the term "copy" also has ramifications for the interplay between state contract law and the federal copyright statute. There is a growing body of state contract law that employs the term "copy;" however, the definition of the term differs from that used in the U.S. copyright law. Here I am thinking of the Uniform Computer Information Transactions Act ("UCITA") that was drafted by the National Conference of Commissioners of Uniform State Laws and approved for enactment in all states at its meeting in July 1999.[8] Without going into the details of prior drafts, for purposes of illustration, I will limit my comments to the current version of what is now known as UCITA. Section 102(20) of UCITA defines "copy" in terms of the "medium" on which information is fixed. However, it is not clear whether "medium" is limited to a physical copy or includes, for example, information expressed in some digital form that is mapped into one or more continuous waveforms (i.e, analog signals) for purpose of transmission to say a remote computer. Since the definition of the term "delivery" in UCITA is intended to cover both "voluntary physical" or "electronic transfer" of possession or control of a copy, does this mean that "medium" for UCITA is not the same as "material object" for copyright purposes? This difference may prove troublesome unless there is some coherence drawn between the differing concepts. Whether "delivery" is the same as distribution, or whether it is broad enough to cover both "distribution" and "public performance," or some new right, should also be clarified.

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[7] Id. at 79.

[8] For text of UCITA, see http://www.ucitaonline.com

There are also important differences between the definition of "computer program" for purposes of UCITA, and "computer program" under copyright law. This may have ramifications for a consideration of a logical unit of information for a possible amendment of section 109. Under UCITA, "separately identifiable informational content" is not included under the definition of computer program; and "informational content" is generally intended to cover information "to be communicated to or perceived by an individual." The U.S. copyright law does not require that works incorporated in a computer program (works that may be viewed as "informational content" under UCITA) are as such excluded from the scope of the term "computer program" for copyright law purposes. This is a particularly important point where new creative works are embodied in a computer program that is performed on a single computer or on a distributed basis over the Internet; and no protected expression would necessarily be "communicated to or perceived by an individual."

This recalls the rulemaking proceeding at the Copyright Office with respect to protection of computer programs that incorporate typeface designs. An early regulation required that applicants disclaim data pertaining to the typeface; however, the Office was later persuaded to change this position and found that "computer programs designed for generating typeface in conjunction with low resolution and other printing devices may involve original computer instructions entitled to protection under the Copyright Act."[9] Even if this arbitrary distinction between computer programs and informational content remains confined to the state level for now, the law in this area continues to evolve. In the event the law embraces the notion of a logical entity that is uniquely and persistently identifiable, it may show the way forward for a reconciliation between the now disparate concepts in UCITA and the federal copyright statute.

The term "copy" also comes into play in such provisions of the UCITA as section 502 on "Title to Copy." For example, under Section 502(b)(2)(B), "[i]f an agreement provides for transfer of title to a copy, title passes: . . .with respect to electronic delivery of a copy, if a first sale occurs under federal copyright law, at the time and place at which the licensor completed its obligations with respect to tender of the copy." The commentary on this section further stresses the link between this provision and the federal copyright concept of first sale as follows:

> "Title transfers when the licensor completes its obligations regarding tender of delivery, which obligations are spelled out in Section 606. The rule for electronic transfers is the same, but explicitly defers to federal copyright law. Some argue

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[9] Registrability of Computer Programs that Generate Typefaces, Final Regulation, 57 Fed .Reg. 6201 (1992).

> that even if there is an intent to transfer title to a copy, an electronic transfer of a copy of a copyrighted work is not a first sale because it does not involve transfer of a copy from the licensor to the licensee. Under subsection (b), state law expressly coordinates with resolution of that issue in federal law."[10]

It would appear from this commentary that the meaning of section 502 of UCITA may benefit from clarification of the meaning and scope of section 109 of the U.S. copyright law. In any event, a study of section 109 should take into account the possible impact of section 109 on state contract law, and the scope of the preemption of state law by the federal copyright statute in this context. There may also be implications for the copyright law concept of "first sale" that may develop around the concept of a "Transferable Record" as set forth in the Uniform Electronic Transactions Act (UETA); however, it is a bit early to tell how this will evolve.[11]

Interplay between Patent & Copyright Law

Over the last decade, there has been an increasing focus on the application of patent law to the now vigorous information economy. The decision of the U.S. Court of Appeals for Federal Circuit in the case of State Street Bank v. Signature[12] that recognized patent protection for business methods provides some guidance on this emerging area of the law.[13] In the State Street case, the court held that "the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces 'a useful, concrete and tangible result' -- a final share price momentarily fixed for recording and reporting purposes and even accepted and relied upon by regulatory authorities and in subsequent trades." At first glance the notions of "tangible" and "momentarily fixed for recording" would depart from the normal meanings of these concepts for copyright law purposes. There are other aspects to consider.

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[10] Official Comments on Section 502, reprinted in Electronic Contracting: Current Law and the Uniform Computer Information Transactions Act, at 187 (2000).

[11] For text of UETA, see http://www.uetaonline.com

[12] State Street Bank & Trust v. Signature Financial Group, Fed. Cir. No. 96-1327 (1998), at http://laws.findlaw.com/Fed/961327.html ; see also AT&T Corp. v. Excel Communications, Inc., Fed. Cir. No. 98-1338 (1999), at http://www.law.emory.edu/fedcircuit/apr99/98-1338.wp.html

[13] For interesting discussion of developing law of business method patents, see "Automated Financial or Management Data Processing Methods (Business Methods)," http://www.uspto.gov/web/menu/busmethp/index.html

A careful evaluation of the interplay between possible patented processes or method patents, and the products or services produced using such processes or methods is warranted. If the "first sale" doctrine is expanded or extended to include the developing electronic arena (and the need for such a move is still far from clear), then the notion of the unit of information that is to be viewed as the virtual equivalent of the "copy" should be clarified. The developing patent law around the concept of a "data structure" may be a starting point in this context. Care should be taken, however, since traditional copyright-dependent industries today do not usually rely on patents to protect the result of the physical instantiation of their protected works. However, new information economy organizations may opt to follow such a path.

Consider the data structure called a "novel." When a literary work is expressed as a novel and fixed on paper, normally there is no question raised about patents in this method of structuring the data. The same may be said for what might be viewed as the method of expression itself, e.g., English language and syntax. However, in electronic commerce, where works are often expressed initially in digital form, using new computer languages like Java, there may be patents claimed not just in the method of structuring the data, but in the resulting product itself. The dividing line between what is subject to patent, and expression protected by copyright, is increasingly ambiguous. Indeed the two areas already appear to overlap, at least in part. Certain understandings may need to be reached on when a process or method should be deemed subject matter of patent, and when the copyright law should be preeminent. Anytime someone wants to write the virtual equivalent of a novel or publish a newspaper or express a copyrighted work in some new data structure, there should be some generally understood forms of expression that would not require an author to negotiate a patent license.[14]

Communications Law -- Extended

The Digital Millennium Copyright Act ("DMCA") marks an important step forward in adapting the U.S. copyright law to meet the capabilities of the evolving information infrastructure; however, one aspect of the existing communications law merits further reflection in the context of a study of section 109. In weighing possible electronic alternatives to the physical copy, some account should be taken of current communications law as it relates to the conventional broadcast, satellite and cable industries. If the notion of a uniquely and persistently identifiable unit of information is found to be generally comparable to a physical copy for purposes of an extended version of any new "first sale" doctrine for electronic commerce, then there should also be some discussion of who owns such a "virtual copy" and what rights they may have. In this context, it is important to maintain some logical coherence between any proposed new legislation and the communications law as it has evolved since the enactment of the Communications Act of 1934. An example from the broadcast industry may help to illustrate my point.

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[14] For some general thoughts on this subject, see P.A. Lyons, "Where Electronic Publications and Television Programs are Really Computer Programs: Some Copyright Implications," Scholarly Publishing The Electronic Frontier, ch. 18, at 299 (1996).

In the 1934 Act, Congress recognized that technology existed that would allow someone to receive a broadcast signal, remodulate the signal, and rebroadcast it without permission of the owner of what was called a "program." There was concern that once such programs were broadcast over the airwaves, the broadcaster would lose control over the material. Since at the time there was uncertainty about the application of the definitions of "copying" and "performance" under the 1909 Copyright Act to a radio broadcast, Congress enacted Section 325 to provide broadcasters, and thus program owners, some degree of protection against the usurpation and redistribution of their valuable programming.[15]

Distinct from copyright rights, one can conceive of a new "communicator's right" to authorize others to access discrete units of information that may be stored in network-based repositories, or accessed via software "agents" that interact with other such agents. The notion of "access to perform stated operations on sets of sequences of bits" is a potentially important new addition to the provision of communications services which may fit comfortably in the context of the communications law; and, it appears useful for the rules governing authorization for such access to be articulated within the framework of that law. This would allow for the broadening of any such new legislation to cover situations where the material in question is not based on or incorporates copyrighted works or performances of works.

Managing Access to Digital Information

Access to repositories of information expressed in some digital form for storage, processing, retrieval and other stated operations will be a fundamental attribute of business in the future. The notion of what today are called "databases" may prove too limited to adequately describe the dynamic information resources under development or now actually being deployed. I am attaching a paper prepared by me for a Congress held at Monaco in March 1997, and published in the ASIS Bulletin of December/January 1998.[16] It provides a brief overview of the notion of digital objects (sometimes referred to as packages, containers or, more generally, structured bit sequences) and their supporting technologies. In this context, a digital object is understood as one or more sequences of bits or sets of such sequences that contain "typed data" (to allow the sequences to be interpreted) and include a unique, persistent identifier for the object known as a "handle" (or, in certain instances a "DOI").[17] There are several implementations of this technology to date in various sectors of the economy such as the publishing industry.

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[15] Section 325(a) states in part: ". . .nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." 47 U.S. C., sec. 325(a); see generally J.E. Dunstan & P.Lyons, "Access to Digital Objects: A Communications Law Perspective," Annual Survey of American Law, 3 N.Y.U. L. Sch. 363 (1994).

A practical illustration of the general concept of a digital object, and the possible need for further consideration of the legal and procedural framework for the deposit of such objects in multiple repositories, was the subject of a recommendation of the Committee on Intellectual Property Rights and the Emerging Information Infrastructure.[18] While the recommendation referred to the "deposit of digital files in multiple depositories," the underlying concepts relate more generally to the deposit of structured bit sequences in one or more repositories. Fundamental aspects of such an information infrastructure were described in a paper on a framework for distributed digital object services.[19] With appropriate authentication, storage and access mechanisms in place, digital objects could attain a similar attribute of persistence as a "material object" such as a book printed on paper. This framework represents an important contribution to the emerging information infrastructure and points the way toward managing information in the networked environment.

There is a relationship between the recommendation concerning "deposit of digital files" and the meaning of "copy" for purposes of section 109, as well as the more basic concept of "publication" for copyright law purposes. It is important to recall that section 407 of the U.S. copyright law provides generally that "the owner of copyright or the exclusive right of publication in a work published in the United States shall deposit at the Library of Congress, within three months after the date of such publication . . . two complete copies of the best edition." There is also an interplay between section 407 and the requirements for registration of copyright claims that should be considered in this context.

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[16] See http://www.asis.org/Bulletin/Dec-97/lyons.htm (reproduced in the **Appendix**); this paper was prepared for delivery at the Unesco International Congress on Ethical, Legal and societal aspects of Digital Information, held at Monaco, March 10-12, 1997.

[17] For information and software relating to "handles," see Handle System at http://www.handle.net Information on the DOI may be found at http://www.doi.org

[18] The Digital Dilemma, Intellectual Property in the Information Age, Computer Science and Telecomm. Board, National Research Council, at 208-209 (2000).

[19] R.E. Kahn & R. Wilensky, "A Framework for Distributed Digital Object Services" (1995), available at http://www.cnri.reston.va.us/home/cstr/arch/k-w.html

The meaning of the term "copy" came up for discussion at the Copyright Office several years ago in the course of the Advisory Committee on Copyright Registration and Deposit (known as the Accord group). Consideration was given to whether there was a distribution of copies for purposes of publishing works where no actual "copy" of the work was transmitted to the public. The Accord group decided to propose legislation to Congress that would amend section 407 to extend to unpublished, but publicly transmitted works. This proposal did not get very far due to opposition from representatives in the computer program and database industries.[20]

In closing, a study of the meaning of section 109 should take into account the ramifications of any proposed change on the basic concepts underlying the U.S. copyright law as a whole, as well as patent and communications law. The interplay between the federal copyright law and state contract law should also be explored. Any examination of the meaning of this provision should not be carried out in isolation. If the notion of a "virtual copy" (or other similar data structure) that may be "delivered," "transmitted," "processed," "accessed" or otherwise used in a networked environment is to be considered, then it is essential that an analysis of such a proposal be carried out in light of the developing information architecture, including the work that is going forward around the concept of digital objects. In any study of the role of section 109 of the copyright law, however, the primary role of copyright in encouraging the creation and dissemination of works of authorship should be kept uppermost in mind. An effort to expand public access to copyrighted works should not inadvertently lead to a severe limitation on the ability of copyright owners to control the dissemination of their works.

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[20] See Copyright Reform Act of 1993, H.R. Rep. No. 103-833, 103d Cong., 1st Sess., at 25 (1993) (proposed study "to determine how to implement an amendment to that section [407] extending the mandatory deposit provisions to unpublished, but publicly transmitted works, including computer programs and online databases"); see also Report of the Advisory Committee on Copyright Registration and Deposit, Co-Chairs R. Wedgeworth and B. Ringer, 86 Copyright L. Rep. (CCH), at 55, n. 14 (1993).

APPENDIX

Managing Access to Digital Information: Some Basic Terminology Issues

by Patrice A. Lyons

Often, a marked technical advance stimulates a period of intellectual progress. It is widely recognized that the printing press was such a development. Whereas, before this invention, only a few books were laboriously produced, and fewer still were available to the public, the printing press opened the doors for sharing information with a much larger audience. There is little doubt that this new procedure for communicating ideas had a major impact on civilization. Other data structures besides books, such as newspapers, monographs and journals, also emerged to take advantage of the capabilities of the printing press.

In this century, radio and television technology ushered in a yet more diversified medium of communication. In addition to expressing ideas with printed text and illustrations, information could be widely shared in a dynamic form consisting of a series of related sounds and images. While the data structure understood as "the book" played (and continues to play) a leading role in the print-on-paper world, a unifying structure, known as "the transmission program," facilitates the origination and transmission of information in the broadcast, cable and satellite communications industries. This unit for organizing and identifying information has generally been regulated under communications and trade laws, but it also has implications for the application of copyright law in a communications environment. For example, the North American Free Trade Agreement (NAFTA) makes provision for the protection of "encrypted program-carrying satellite signals."

Like books and transmission programs in the past, what logical entities are most appropriate to facilitate commerce in creative works in a digital environment?

Over the last decade, there has been substantial growth in the use of computer networking capabilities for the creation and dissemination of copyright works. Of particular note is the emergence of the Internet. For definition of Internet see

http://www.fnc.gov/Internet_res.html

This phenomenon is not a unique situation in the history of intellectual progress. It has been a distinguishing feature of human potential to challenge existing assumptions, to reconceptualize given knowledge and to generate diverse informational materials and artifacts for entertainment, educational, industrial and other purposes. Technology has simply helped to accelerate the process.

The widespread availability of global information systems like the Internet carries with it the potential to generate and share information at a degree of complexity and pervasiveness that was unimaginable until recently. Already, information is being posted on the Net that would otherwise only be available to a restricted group, if anyone knew of its existence. Unlike transmission programs consisting of sounds or images that are produced solely for communication to the public in sequence and as a unit, digital information is inherently malleable. Information expressed as sequences of binary digits (or bits) may be accessed interactively, data streams from widely distributed sources may be intermingled and new works dynamically generated and processed.

There is a growing perception in the research community, and increasingly by leaders in copyright-dependent industries, that data structures are needed to enable the organization and identification of units of digital information for purposes of managing rights and interests in a network environment. Efforts in this direction are well underway. Of particular note is a framework under development that will enable copyright works and other information resources, once configured as "digital objects," to be reproduced, stored, accessed and disseminated over computer networks in this new form of data structure. This architecture grew out of a program organized and led by the Corporation for National Research Initiatives (CNRI) under the sponsorship of the U.S. Defense Advanced Research Projects Agency and with the active participation of the U.S. Copyright Office of the Library of Congress. Fundamental aspects of this information infrastructure were described in a paper entitled "A Framework for Distributed Digital Object Services" by Robert Kahn and Robert Wilensky. It is available on the Internet at

http://www.cnri.reston.va.us/home/cstr/arch/k-w.html

Digital objects (sometimes referred to as packages, containers or, more generally, structured bit sequences) and their supporting technologies have emerged as a focus of experimentation. In this context, a digital object is understood as one or more sequences of bits or sets of such sequences that contain "typed data" (to allow the sequences to be interpreted), and include a unique, persistent identifier for the object known as a "handle" (or, in certain instances, a "DOI"). The digital object is intended to be a generic means of structuring information in the digital world. A digital object may incorporate information in which copyright, patent, trade secret or other rights or interests may be claimed, although this need not always be the case. Key infrastructure components of an open architecture that supports digital objects are discussed in a Cross-Industry Working Team (XIWT) white paper entitled "Managing Access to Digital Information: An Approach Based on Digital Objects and Stated Operations" that is available at

http://www.xiwt.org

Digital objects may be deposited and stored in a network-based computer system or "repository" for possible subsequent access. Repositories may be operated in a variety of ways, spanning the range from individual storage depots to bulletin boards to broadcast stations on the Internet. From a copyright perspective, it is important to stress that a "handle" identifies a particular logical entity, i.e., a data structure, in which a work or other information has been embodied, but not the underlying information itself.

A unique and important attribute of a digital object embodying a copyright work is the capability of the object to incorporate data about itself. This information or metadata may include conditions for accessing the digital object and/or its underlying content, or an indicator to where such information may be available. The digital object may also enable a negotiation to take place where a user wishes to go beyond any conditions previously set forth in its metadata. This capability is an essential ingredient to enable and encourage the growth of commerce in copyright works in a digital environment.

Several organizations are now building testbeds to implement the digital object framework. These include two at the U.S. Library of Congress and another in the publishing community sponsored by the Association of American Publishers. Information on the publishers' initiative is available at

http://www.doi.org

A key goal in these efforts is to provide an open architecture that allows the identification and management of access to digital information. They seek to make both proprietary and non-proprietary information available in a structured and well-known way with open interfaces, protocols and object structures. A digital object as a structured package of encrypted information may also facilitate the development of flexible and efficient mechanisms for managing rights or interests in a computer network environment. In this context, the keys can be managed and distributed independently from the digital object itself. This capability for managing rights or interests also applies where intelligent agents, structured as digital objects, act on behalf of rightsholders in a network environment to protect works embodied in such objects.

What is the copyright status of original works of authorship structured as "digital objects"?

When Congress revised the United States federal copyright statute about 20 years ago, it restated the two fundamental criteria of copyright protection: originality and fixation in tangible form. From the first U.S. copyright statute, which designated only "maps, charts and books," the copyright law has grown to include new forms of expression as creative and worthy of protection. The wording of the definition of fixation, however, limits this expansive intent. It specifically provides that a work is "fixed" in a tangible medium of expression when it is embodied in an authorized "copy" or "phonorecord." Generally, a copy for these purposes is a material object (other than a phonorecord). This limitation is not just a matter of passing interest in the context of U.S. law. The concept of fixation is important, since it represents the dividing line between the application of the federal copyright statute and any protection that may be available under State common law or statute.

What it means to be a copy also came up at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions convened by WIPO and held in December 1996. Specifically, the following text appears under the Agreed Statements concerning Articles 6 and 7 of the WIPO Copyright Treaty adopted by the Diplomatic Conference: ". . .the expressions 'copies' and 'original and copies' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects." While the Conference thus clarified the intended meaning of copies, the meaning of original may require further analysis. In the United States, an original may be deemed to apply to the first fixation of a work in a tangible form; however, many countries extend copyright protection to what are sometimes termed original works without a fixation requirement.

This topic is particularly interesting to consider where "original works of authorship" for purposes of U.S. law (or what are sometimes termed "original works of the mind" under other bodies of law) are created wholly within a global information system like the Internet, and where, in this environment, there may be no material fixation (or copy) generated, much less distributed. A novel interpretation of materially fixed might include a capability that supports "fixation on demand"; however, there would still be some inherent ambiguity about the status of such works prior to their fixation.

The development of a digital object infrastructure may enable the expansion of copyright protection to accommodate works that are not first fixed in a tangible medium of expression, or, in the case of material such as live broadcasts, that are not recorded simultaneously with their transmission. Introducing the notion of a structured, logical unit, i.e., a "digital object," may better accommodate the emerging capabilities of digital technology. These include, in particular, the deployment of such dynamic resources as intelligent agents. It may also avoid the use of ambiguous and oxymoronic terms such as intangible copies.

In addition to the existing requirement under U.S. law that an original work of authorship be "fixed in a tangible medium of expression" for federal copyright protection to attach, an alternative criteria may prove very useful in a network environment:

> "an original work of authorship structured in a persistent, uniquely identifiable medium of expression from which it may be reproduced, perceived, performed or accessed by any device or process for a period of more than transitory duration."

For purposes of this proposed new provision, structured may be defined to include digital objects and other equivalent data structures.

A digital object with its unique persistent identifier thus serves much the same purpose as a material fixation under U.S. law. Moreover, this concept may also prove of assistance in countries that extend protection without the need for a fixation. A capability of persistently and uniquely identifying a data structure in which copyright works, or performances of works, are embodied may encourage the development of a new marketplace for copyright works in a digital environment. Of course, where an original work of authorship structured as a digital object is actually fixed in a tangible medium of expression, copyright protection would subsist in accordance with current U.S. copyright law. My proposal would simply offer an alternative basis for protection to attach.

Should the processing and communication of bits be viewed as a distribution and/or a performance?

Questions have been raised about the classification of new creative works like MIDI sequences for purposes of copyright. Are they literary works? Musical works? Computer programs? Sound recordings? Further, what happens when users access a network-based repository of such works on an interactive basis, and the results of such access are disseminated over the Internet? Depending on the nature of the access request, the dissemination may not represent any particular sequence of bits that previously existed in that, or indeed, any repository. This situation is also likely to become increasingly prevalent where complex works, such as knowledge-based systems, are made commercially available over the Internet to provide advice and guidance on a wide variety of topics.

Many information resources (configured as digital objects or not) that are now accessible to the public over the Internet may look and sound like conventional copyright works. Often, the term multimedia is applied to these capabilities, as if these resources were simple compilations of several traditional works, such as music, photographs, films or text, to be treated as what might generally be called data. It may be appropriate to regard these works as a whole as either computer programs or computer databases, or some combination thereof. However, a more accurate, comprehensive and flexible terminology to describe this emerging area is needed that reflects the realities of the underlying technology.

Information in digital form (whether of a purely symbolic or numeric character) is a purely conceptual entity; however, it may be represented as a real entity in the form of symbols or numbers fixed in a material object, where it is usually considered a "literary work" for copyright purposes. In light of the developing capabilities of digital technology, Committee No. 702 of the American Bar Association explored whether it might be helpful to establish a subcategory of literary works capable of behavior, to be called "digital works." In its 1996 report, the Committee proposed the following definition for discussion purposes: "'Digital works' are literary works consisting of an ordered set of symbols from a discrete alphabet, such as computer programs or knowledge structures, that are capable of behavior when processed."

Such a provision is particularly important where a patented process may be involved in the performance of a digital work subject to copyright or where there may be patents involved in the methods used for structuring data.

If a consensus can be reached on what it means to be a "digital work," it may lead to a better understanding of what occurs from a copyright, patent and communications law perspective where information represented in some digital format is mapped into a waveform. Terms such as digital communication or digital transmission may not be adequate to describe the situation fully.

It was the Committee's understanding that, strictly speaking, there are only continuous waveforms (or analog signals) in the real world. A "signal" is meant to be "digital" only in the conceptual sense that it is understood to contain a sequence of discrete symbols or bits. Any sequence of discrete symbols that corresponds to the expression of certain information may be mapped into one or more continuous waveforms. For purposes of copyright, where this ordered set of symbols is viewed as a "digital work," the mapping of the information into a waveform by any device or process may be viewed as a performance of the work. There may be other performances of works that take place, not just at the source, but at the point of reception and within the network itself, where intelligent agents may be tasked with performing various operations. Certain of these performances may be deemed exempt from copyright liability.

Networks and network servers can generally be either active or passive entities in any communications system. As passive entities, they typically serve to communicate bits without essential change from a source to one or more destinations. As active entities, they have the ability to process the information in arbitrary ways. When the information is encrypted at its source, the processing options along the communications pathways are inherently more limited, but it is still possible to perform a limited set of functions within the network, such as aggregation, selective filtering and disaggregation. Thus, the extent of copyright liability for any given situation should be based upon the nature of the service being provided. There may be classes of operations performed on digital objects that have only a minimal, if any, impact on any underlying copyright works. While strictly speaking performances, such operations might be deemed to encompass the "distribution" of digital objects embodying copyright works. Complex operations would most likely bring into play the copyright right of public performance.

There may be rules and procedures developed for access to digital objects, or repositories of digital objects, that may overlap and impact in practice any copyright and other rights or interests that apply to the underlying information content. In the context of a digital object infrastructure, there has been some discussion of the notion of "access to perform stated operations on a sequence of bits." Whether, and under what circumstances, such operations should be accommodated under communications laws, and how protection at the digital object level will interact with any copyright, patent, banking, privacy, trade secret and other rights or interests in an object's contents, is an important area for continued discussion and experimentation. Where a copyright work is configured as an encrypted digital object, a new set of capabilities is introduced having great potential for the management of rights or interests in a network environment or even for indicating that there are no restrictions placed on access to digital information.

In summary, this paper has introduced the digital object as a logical structure for organizing information expressed as sequences of bits (like the book or the transmission program in other media). It compares the characteristics of digital objects, i.e., unique persistent identifiers, network accessibility and typed data, to the attributes of fixation in a material object and shows them to be generally equivalent. In addition, it introduces a notion of a digital work as a literary work that is capable of behavior and discusses some of the attributes of encrypted digital objects that may bring into play the copyright rights of distribution, as well as public performance, in a network environment.

Digital Media Association

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE
Washington, D.C.

Report to Congress Pursuant to	)	
Section 104 of the	)	Docket No. 000522150-0150-01
Digital Millennium Copyright Act	)	

COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

The Digital Media Association ("DiMA"), pursuant to the notice published at 65 Fed. Reg. 35673 (June 5, 2000) ("Notice"), and Section 104 of the Digital Millennium Copyright Act ("DMCA"), is pleased to submit these comments in connection with the study by the Copyright Office and the National Telecommunications and Information Administration of two important issues affecting electronic commerce and copyright policy: the scope of the "first sale" doctrine in the digital environment, and exemption from infringement the making of archival copies and temporary copies of digitally-downloaded works in the course of authorized uses (the "Study").

DiMA (http://www.digmedia.org) was formed on June 2, 1998, by seven (7) companies leading the creation of new ways to deliver and market music and video over digital networks to promote three core principles:

- To promote pro-consumer competitive opportunities in digital distribution, transmission, broadcast, and retail of digital media;
- To encourage the development and use of responsible measures to protect intellectual property rights, including the payment of fair and reasonable royalties associated with such rights; and,
- To oppose technological and legal barriers that inhibit innovation or adoption of new technologies, products and services.

On June 5, 1998, DiMA testified before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection that resolving both of the issues to be addressed in this Study was essential to growing ecommerce and Internet broadcasting. Thus, DiMA was particularly gratified that Congress had the foresight to require in Section 104 of the DMCA that this Study be timely conducted.

Today, just two years after DiMA's formation, our more than 50 members[1] believe that extending the first sale doctrine to cyberspace and exempting temporary buffering during streaming will promote ecommerce in copyrighted works. These last two years have witnessed a dramatic increase in the scope and popularity of Internet webcasting of audio and video programming; and this year promises to be a turning point for the sale of copyrighted sound recordings and video over the Internet. Questions surrounding the legal status of webcasting or consumer rights in digitally-purchased media, if left unanswered, will put a damper on these promising markets and technologies. The time to resolve these issues is now.

In response to the Notice and the questions set forth therein, DiMA's comments below elaborate on the following three key points:

1. Extending existing limitations on the rights of copyright owners into the digital environment is consistent with the policies underlying the Copyright Act and the WIPO treaties implemented by the DMCA. To rapidly promote ecommerce, it would be preferable to enact these limitations into law rather than wait for the courts to sort through the issues.

2. To create a level playing field for ecommerce in digitally-delivered audio, video and other media, the first sale doctrine of 17 U.S.C. § 109(a) must be extended, either by judicial interpretation or amendment, to apply to content lawfully acquired by digital transmission. Unless consumers receive from digital media the same quality, value and convenience they receive from physical media, ecommerce will be left stranded at the starting gate.

3. The exemption in 17 U.S.C. § 117 that legitimizes archiving and usage of computer software should be adapted and applied to digitally-delivered performances and copies. Specifically, temporary copies that enable the performance of digital media, including streaming audio and video, should explicitly be exempted from the exclusive rights of copyright owners, including the rights of reproduction and distribution. Further, consumers should retain the right to make one archival copy of digitally-delivered media to guard against losses from technical errors or equipment failure.

I. Extending Current Limitations Into the Digital Environment is Consistent with Copyright Policy and International Obligations.

Two policies draw the baseline for any discussion of whether or how to adapt the Copyright Act to the digital networked environment. First, copyright exists to promote the public interest. Securing the rights of authors is intended to provide incentives to support the greater public good, not to be an end in itself. See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-350 (1991); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). Hence, statutory changes and interpretations of copyright law should balance the impact of the law upon the copyright owner against the paramount public interest in the dissemination and proliferation of copyrighted works.

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[1] A list of DiMA's current members is attached.

Second, copyright law should respond to technological progress, not hinder it. As the Supreme Court has noted, "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment - the printing press - that gave rise to the original need for copyright protection." Id., 464 U.S. at 430.[2] Courts have the responsibility to flexibly interpret copyright law in light of its implications for the public interest; but the primary responsibility for adapting copyright law resides in Congress. Id., at 430.

Summarizing these principles a quarter-century ago, the Supreme Court wrote:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an `author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ***'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.***

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations and footnotes omitted); emphasis added..

Both of these fundamental principles find further support in the treaties that prompted Congress to adopt the DMCA, namely, the 1996 World Intellectual Property Organization ("WIPO") Copyright Treaty and WIPO Performances and Phonograms Treaty. The Preamble to the WIPO Copyright Treaty recognizes both "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works," and "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention." WIPO Copyright Treaty, CRNR/DC/94 (December 23, 1996).[3]

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[2] "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." Id., 464 U.S. at 430-431 (footnotes omitted.)

[3] Equivalent language is found in the Preamble to WIPO Performances and Phonograms Treaty ("WPPT"), CRNC/DC/95 (December 23, 1996).

Similarly, the Agreed Statements concerning the WIPO Copyright Treaty, with specific reference to the adoption of limitations and exceptions to copyright, provide:

> It is understood that the provisions of Article 10 [regarding limitations and exceptions] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Agreed Statements to WIPO Copyright Treaty, CRNR/DC/96 (December 23, 1996).[4]

Thus, both domestic and international copyright policy embrace the need to extend existing privileges and exemptions under copyright into the digital networked environment.

Generally, the competitive market should be given time to evolve before making "pre-emptive" changes to copyright law. Over time, DiMA believes that existing exemptions created for the "physical" world likely would be adapted to the digital realm by judicial interpretation, or justified under doctrines such as fair use. Nevertheless, the public interest and the evolution of the marketplace often are better served by laws that clearly address and define the rules for a new technological environment. "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994). Indeed, as the Copyright Office recently noted in a similar context:

> Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods.

Report on Copyright and Digital Distance Education, at 144 (May 1999). Thus, legal certainty in applying copyright to new digital technologies benefits the copyright owner and user alike, and prepares the market for compelling technologies and business models. Indeed, the explosion of webcasting since the enactment of the DMCA statutory performance license provides an object lesson in how a stable legal environment provides the launch pad for new industries.

Given the light-speed innovation of today's digital world -- and even the speed of light isn't all it used to be -- it would be unreasonable to expect legislation to anticipate or even keep pace with all the pushes and pulls upon the copyright envelope. However, several copyright disputes threatening digital media companies are overdue for resolution. Among them are the two issues encompassed within this study:

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[4] See Agreed Statement to Article 16 of the WPPT: "The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty." CRNR/DC/97 (December 23, 1996).

- The first sale doctrine should be applied to digitally-delivered copies and phonorecords of copyrighted works; and,
- Temporary buffer memory copies made in the ordinary operation of streaming media software, and archival back-up copies of digitally-delivered media, should be explicitly exempted from the right of reproduction.[5]

Clarifying these legal principles will promote the growth and development of electronic commerce and the dissemination of copyrighted works. DiMA suggests below why these privileges neither conflict with the normal exploitation of copyrighted works nor unreasonably prejudice the legitimate interests of copyright owners.

II. The First Sale Doctrine Should Explicitly Extend into the Digital Environment.

A. A Historical Perspective

The first sale doctrine balances the economic rights of the copyright owner and the consumer with respect to copyrighted works. The rationale underlying the first sale doctrine has its roots in the English Common law rule opposing restraints of trade and restraints upon alienation of personal property,[6] and is adopted internationally in copyright and patent law as a principle regarding the exhaustion of the proprietor's rights upon first sale.

Copyright law secures to the copyright owner the exclusive right of first distribution, to provide an incentive for the creation and dissemination of works. However, once the copyright holder has been compensated for the initial distribution of the work, no further incentive is required, so the copyright owner should be unable to extract further profits from that particular copy of the work. After that first sale, as the Supreme Court held nearly a century ago, the "right to vend" has been fully exercised and further limitations cannot be imposed on disposition of those goods.[7] This doctrine has been embodied in substantially equivalent forms under both Section 27 of the Copyright Act of 1909[8] and Section 109(a) of the current Act.[9]

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[5] A third, equally important, issue concerns the extension of the Section 110(7) exemption for in-store performances of music to explicitly encompass online retail. DiMA briefly addresses this issue *infra* at Section IV.

[6] See Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881, 883 (E.D. Pa. 1964). See also H.R. Rep. No. 987, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 2899.

These rationales apply with equal force in today's digital world. The law should not discriminate against digital embodiments. Once the copyright holder has been justly compensated for the initial sale of the work, the consumer should have the same right to dispose of the copy, regardless of whether it was acquired as a physical or digital copy.

B. First Sale Remains Rational and Necessary in the Digital Environment.

Although a court justifiably could interpret the existing language of Section 109(a) to protect digital retransmissions of digitally-acquired content, some copyright owners have disputed this interpretation. In DiMA's view, an unambiguous statement that the first sale doctrine applies to digitally-acquired content will benefit all parties. DiMA therefore supports legislative clarification of Section 109 so as to firmly establish that the first sale doctrine applies to digital retransmissions of digitally-acquired copies and phonorecords of copyrighted works.

The first legislative initiative to recognize the necessity of the digital first sale doctrine occurred in November 1997. Representatives Rick Boucher and Tom Campbell introduced H.R. 3048 (the "Boucher-Campbell bill"), which would have amended the first sale doctrine to include digitally-acquired media. This bipartisan bill, subsequently co-sponsored by approximately 50 representatives, would have added to Title 17 a new Section 109(f) that would have permitted the operation of the first sale doctrine by transmission of the work to a single recipient, if the person effectuating the transfer erases or destroys his or her copy or phonorecord at substantially the same time. In its June 8, 1998, testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection, DiMA supported both the extension of the first sale doctrine to digitally-acquired media, and the passage of that provision of H.R. 3048:

> The "first sale" doctrine should be adapted for the digital environment. Just as consumers have the right to resell or give away a book, CD or video purchased in a physical retail store, they should have the right to transfer ownership of copies

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[7] Bobbs-Merrill Company v. Straus, 210 U.S. 339, 350-51 (1908).

[8] Section 27 of the 1909 Act stated, in pertinent part, "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained."

[9] Section 109(a) states, *inter alia*, "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a).

> received electronically. ***If Internet commerce is to succeed, consumers must have the assurance that the electronically purchased copy is just as good and valuable as the store-bought copy, and a copy that cannot be resold or given away is a lot less valuable.*** Rep. Boucher's bill, H.R. 3048, would secure this existing right for the digital environment. In the past, the argument has been made that, in the digital environment, if that transfer of ownership is done by computer, then a copy remains on the sender's computer even after the copy has been transmitted. This is a flawed argument. Technology companies like Liquid Audio and a2b music already have developed technologies for secure electronic delivery and copying of music. They, and many others, are capable of developing software that will ensure that the copy on the sender's computer is deleted after transmission. But they will have no incentive to develop these technologies if the first sale doctrine does not apply, since their technology still would be unlawful.

The passage of time has only proved these views correct, but the risks from operating without the digital first sale doctrine are imminent. On July 24, 2000, market analysts at Jupiter Communications released estimates that annual U.S. sales of digitally-downloaded music could reach $1.5 billion by 2005. Without a first sale doctrine, this market may not reach its potential. And as we have already seen in related Internet contexts, failing to capitalize on the inherent flexibility of digital systems delays market development and entices others to illicitly provide the convenience the consumer desires. When law and ecommerce enable the online consumer to receive full value, quality, convenience and service, the business and the market will prosper.

The technology to secure the first sale privilege exists today. As will be explained further below, copyrighted content can be delivered to the consumer with digital rights management ("DRM") systems that enable secure electronic transfers of possession or ownership, and that protect against unauthorized retention of the transferred copy. Extending the first sale doctrine to the electronic environment will provide the incentive for development of newer, more flexible, and more efficient DRM tools. Thus, by explicitly extending the first sale privilege to digitally-delivered works, DiMA believes that the law will simultaneously promote the interests of consumers, copyright owners, and companies engaged in building the new ecommerce economy.

With this background, DiMA responds below to the questions posed in the Notice.

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

The impact on the first sale doctrine of Section 1201 to date has been limited, in light of the embryonic state of ecommerce. At this stage, DiMA can describe how the anticircumvention provisions have had a positive impact or no impact on ecommerce; yet we also can envision scenarios in which they would diminish or negate the operation of the first sale doctrine.

(i) Technological protection measures can support the first sale privilege.

On the positive side, encryption can facilitate practical implementations of the first sale doctrine. Several companies have implemented technologies to electronically deliver digital copies or phonorecords in encrypted form. Protected files (such as music, motion pictures, photographs or text) can be copied freely, but cannot be accessed without the decryption key. Therefore, maintaining tight technological control over the transmission of the decryption key effectively maintains security over the digital media file. To implement first sale using encrypted content, then, the technology would need merely to limit copying of the decryption key, and to assure transmission of that key along with the transfer of possession of the digital phonorecord or copy. Once the key has been permanently transmitted from the seller's machine, any encrypted data remaining in the seller's storage media is inaccessible and valueless.

Similarly, authentication processes can be implemented so as to assure that digital copies and phonorecords are transferred securely and permanently. For example, a software technology could incorporate means for assuring the deletion of the content from the first owner's computer following successful transfer of the content to the new owner. Then, when initializing the transmission process, software on the seller's and purchaser's computers can authenticate each other through a series of cryptographic challenges and responses, and establish a secure channel for the transmission of the content according to the rules set forth in the software. Once this secure transmission is completed and verified, then the software on the seller's computer can delete or disable access to the work.

Such encryption and authentication systems may constitute access controls subject to the provisions of Section 1201(a). In these respects, Section 1201 may be said both to be compatible with and to enable the operation of the first sale doctrine for digitally-delivered content.

(ii) Technological Protection Measures can be Irrelevant to First Sale.

Not all media is delivered electronically in a secured or encrypted format. In such instances, Section 1201 is irrelevant to the operation of the first sale doctrine for digital media.

Thousands of files in the unprotected MP3 format are distributed with authorization of the copyright owner and without charge over the Internet. Wide dissemination of these tracks without restriction is generally the goal, so as to promote unknown artists or create buzz for forthcoming recordings by current stars.

Some companies sell unprotected music with the authorization of the copyright owner. EMusic.com (http://www.emusic.com), for example, markets and sells sound recordings for downloading by the consumer in the MP3 format without encryption or any form of copy protection. Companies such as EMusic view copy protection as an impediment to consumer convenience and the popularization of electronic media. They rely on the honesty of the paying consumer, and take no steps to enforce the operation of the first sale doctrine. In most respects, this business model closely emulates current practice in which physical analog and digital media are delivered without technological protections, and there is no assurance that a consumer who resells a commercial compact disc has not made and retained a copy in another format.

(iii) Technological Protection Measures should not Negate First Sale.

DiMA is concerned that Section 1201 could become a blunt instrument by which to impede or negate the first sale doctrine. To be clear, DRM and other measures will play a critical role in promoting ecommerce and first sale. DRM tools will fuel new business models (such as subscription or on-demand listening, "try before you buy," rental or downloading of promotional recordings that will "time-out" after a specified period) in which first sale privileges should not apply. DiMA welcomes these pro-content owner/pro-consumer opportunities as alternatives to the purchasing of content.

However, technological protection measures applied indiscriminately to digitally-purchased copies or phonorecords of works could prevent electronic resale or transfer of possession. If so, the DMCA anticircumvention provisions will punish consumers that disable or avoid those technological protection measures in order to facilitate legitimate first sale privileges. As a result, Section 1201 could enforce a gross and discriminatory imbalance between digital and physical media that would stifle ecommerce, to the prejudice of online companies and consumers.

Similarly, technological protections could condition the consumer's right to access upon unilaterally-imposed license terms that force the consumer to forego essential privileges (such as first sale or fair use). Leveraging technological protections (and Section 1201) with unacceptable "take it or leave it" contract clauses could significantly interfere with consumer rights and, hence, the success of online digital distribution. As several unsuccessful Internet enterprises already have learned, you ignore consumer rights and benefits at your peril. If online retailers cannot secure basic consumer privileges such as first sale, then digital downloading may remain a promotional tool rather than a dominant sales force.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

DiMA believes that, at this stage, these prohibitions have had no effect on the operation of the first sale doctrine.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

The potential impact of ecommerce on first sale – positive, negative or neutral – likely will not be fully experienced until it is more widespread. DiMA expects that the next 12 months will be the turning point for ecommerce, when three key elements for ecommerce converge.

(1) Technology. The first element, that is, the technology to deliver music in secured and unsecured formats, already is in place. Secured formats include:

- Liquid Audio (http://www.liquidaudio.com) enables the delivery of encrypted music along with rules of use, such as files that become unplayable after a specified time, files that can play only on a specified computer, files that can be burned to recordable CD only once, or files that can be shared on multiple computers. Liquid Audio also has spearheaded an effort to include a "Genuine Music Mark" on commercially-released MP3 files so that even unsecured content can be authenticated by copyright owners.

- EverAd, Inc. developed and markets the "PlayJ" technology (http://www.playj.com), which delivers encrypted music that, when played, displays advertising that effectively monetizes the free downloaded tracks. The advertisements change periodically, and persist on the screen while the music plays.

- RealNetworks (http://www.real.com) provides tools to content owners who wish to securely deliver their content for playback through software applications such as the RealJukebox.

- Reciprocal, Inc. (http://www.reciprocal.com) provides digital rights management services to content owners and distributors. Among its other services, Reciprocal, using underlying digital distribution platforms of companies such as Microsoft, IBM and InterTrust, issues permits that enable consumers to access secured content. Depending on conditions determined by the distributor of the content, Reciprocal issues a permit after consumers make the necessary payment, provide requested information or without any requirement whatsoever. While the secured content file may be transmitted by the original consumer to others (i.e. "superdistribution"), subsequent recipients of the file must separately obtain a permit to access the content pursuant to the usage rules established by the original distributor of the content.

All these companies participate in the recording industry-led SDMI effort to establish specifications for secure music content. These and other technologies are becoming popularized by content companies and online retailers that offer pay downloads of music files. Thus, this necessary element of the infrastructure already is in place.

2. **High-Speed Distribution.** Second, the success of digital downloading also relates to the pace of the rollout of broadband technology. DSL and cable modem service to the home will speed the downloading of media, making ecommerce a faster and more enjoyable consumer experience. To some extent, the pervasive penetration of Napster, Gnutella, ScourExchange and other similar file-sharing services suggests that consumers will tolerate a certain level of delay in getting music online. In this connection, a recent Yankelovich survey co-sponsored by DiMA shows that more than 80 percent of consumers age 13-39 download music at home, where connections are likely to be slower, than at work or at school. Beyond

question, however, faster download speeds will make digital delivery more convenient, reliable and desirable for the consumer.

3. **Content.** The third element, of course, is availability of content. DiMA members are gratified at the initial forays by content companies into online sales through a variety of retail outlets, but this still is no more than a toe in the water. We hope that, as content companies gain comfort with the medium and experience successes, full catalogs of content soon may become available to the consumer through all online retailer outlets.

With the confluence of these developments, we are reaching the end of the "chicken-and-egg" period of ecommerce. As all three elements fall into place, the task turns now to evangelizing online distribution to the consumer. DiMA therefore expects that, over the next 12 months, the anticipated increases in availability of both legitimate music and faster Internet connections will catapult ecommerce into the consumer mainstream.

However, we emphasize that consumer confidence in ecommerce will develop only if consumers receive full value and convenience from their online transactions. Thus, the first sale doctrine remains important and necessary to the digital legal landscape.

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

As noted above, DiMA believes that ecommerce will flourish only if consumers obtain from their purchases at least the same value and flexibility that they enjoy from purchasing physical media. Thus, amending the first sale doctrine will avert the potential for discriminatory legal treatment for ecommerce, to the prejudice of both consumers and online business.

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The history of the first sale doctrine, described *supra* at II-A, was premised upon a balance between the incentive for copyright owners and the public interest. At the time the first sale doctrine first was embodied in legislative language, ecommerce was science fiction. Yet the statement of the doctrine in Section 27 of the 1909 Act would have been broad enough to accommodate ecommerce: "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained."

In the 1976 amendments to the Copyright Act, the exposition of the first sale doctrine in Section 109(a) became more specific, so as to encompass phonorecords as well as copies; and to clarify that the first sale doctrine applied only to the specific copy or phonorecord acquired by the consumer, not to any copies that might be made therefrom (e.g., by photocopying or home taping). Yet, the underlying premise – that a copyright owner should not be entitled to multiple remuneration or to restrain transfers of lawfully-acquired property – remains as sound in the digital world as in the physical world.

Thus, nothing in the first sale doctrine itself inherently favors physical media over digital media, or overland distribution over electronic transmission.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The first sale doctrine itself, as noted in our response to (e) above, is not premised upon a particular technology or technological environment. The principles underlying the first sale doctrine are technology-neutral.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

For the reasons articulated above, DiMA believes that the first sale doctrine must be expanded to permit lending and transfer of media acquired digitally by consumers.

During the 1997-98 debates over H.R. 3048 and the DMCA, content owners opposed to a digital first sale privilege contended that a digital first sale doctrine would promote rampant copying and redistribution of works, and that consumers could not be trusted to delete their copies once transferred. DiMA continues to believe these concerns are misplaced, for the following reasons:

(1) As DiMA testified in June 1998, technological protections and DRM systems can facilitate the operation of the first sale doctrine in a manner that respects the rights of both copyright owners and consumers. Through technological processes such as encryption, authentication and password-protection, right holders can assure that digitally-downloaded copies and phonorecords are either deleted after transfer or disabled (such as by permanently transferring with the content the only copy of the decryption key).

(2) DRM tools implement the first sale doctrine more securely for digitally-transmitted content than for today's physical media. CDs and books are resold freely; yet, the consumer/reseller may have copied these physical media using cassette or CD recorders, scanners and photocopy equipment. Denying the first sale doctrine for digitally-delivered media ironically would deprive consumers of traditional privileges in a far more secure environment.

(3) Any extension of the first sale doctrine cannot apply only to content protected using DRM tools. As noted above, several online businesses are successfully marketing digital downloaded media in unprotected or open formats such as MP3. In these circumstances, the copyright owner has consented to the distribution of such media while recognizing that it can be freely copied and redistributed. Having elected to rely on the honesty of the consumer for the initial distribution of the content, denying that consumer's entitlement to the fair use privilege would be prejudicial both to the consumer and to the "open format" business model.

(4) Finally, some may contend that the growing popularity of peer-to-peer file sharing technologies somehow justifies their fear of a digital first sale right. Whatever the impact of these technologies, they are irrelevant to first sale. First, most shared files arrive on the computer ripped from a CD. The digital first sale right favored by DiMA encompasses electronic transfers of possession only for media lawfully acquired by digital transmission. Second, DRM systems can protect against any threat posed by file-sharing technologies. If such files may be shared, they either cannot be accessed by the downloader, or (in the case of DRM systems that promote paid superdistribution models) cannot be accessed without payment of a fee. Third, as noted above, content sold without technological protections effectively contemplated free redistribution. In such cases, the content owner anticipates a reasonable return under that business model. There is no reason to thwart consumers that wish to lawfully resell or permanently part with their purchases, simply because others freely trade them.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

Under present law, DiMA believes that a court correctly could interpret the first sale doctrine to apply to digitally-acquired media. However, no cases have addressed this issue to date. DiMA therefore suggests that copyright owners, ecommerce and consumers would benefit from legislative clarification of Section 109.

As noted above, digital delivery is only now emerging as a means to market sound recordings, books and motion pictures to consumers. The absence of the first sale privilege has not had a chance to affect consumers. So far, the leaders in digitally distributing music online have been those which market the music in unprotected form, or which employ DRM systems that enable permanent transfer of ownership. Thus, the "absence" of a first sale privilege has not been felt in the marketplace.

Notwithstanding, ***DiMA believes that it would be highly detrimental to ecommerce if consumers ever experienced the "absence" of a first sale privilege.*** Technologies with seemingly great market potential can be stunted by adverse press or bad initial marketing. Consumers will become dissatisfied with ecommerce if they cannot trade or sell via transmission the works they acquire digitally. Denying consumers a digital first sale privilege is the equivalent of telling consumers that, if they tire of a CD, they must throw it (and their investment) away. The success of ecommerce depends on giving the consumer the same value, with greater convenience and selection. Without a digital first sale privilege, consumers will not buy in to electronic commerce.

III. Section 117 of the Copyright Act Should Exempt Archival and Temporary Copying for Digital Media.

A. A Historical Perspective

Section 117 of the Copyright Act creates an exemption to copyright infringement for the owner of a copy of a computer program to make a copy of that program, as long as making such a copy is an essential step in the utilization of the program in conjunction with a machine and is used in no other manner, or if such copy is for archival purposes.[10] This exemption ensures the rightful owner of a copy of a particular computer program the ability to use it freely without fear of copyright liability, while at the same time preventing a copyright owner from forcing a lawful owner of a copy to stop using the program.[11]

While the legislative history of Section 117 is sparse, Congress did note that Section 117 "embodies the recommendations of the Commission on New Technological Works with respect to clarifying the law of copyright of computer software."[12] Further, courts have noted that "it is fair to conclude, since Congress adopted its recommendations without alteration, that the CONTU Final Report reflects the Congressional Intent."[13]

The CONTU Final Report noted that as a practical matter, computer programs on disks cannot be used without first being loaded into a computer's memory, which by definition involves "copying." The CONTU Report stressed that "one who rightfully possesses a copy of the program...should be provided with a legal right to copy it," *i.e.* "the right to load it into a computer...".[14] But, the Report further stressed that the right exists only to enable use of the program by the possessor, and does not extend to other copies of the program.[15] Thus, the rights granted by Section 117 do not include the right to make the copies accessible to others.[16]

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[10] The text of Section 117 reads, in pertinent part, "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program, provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

[11] See the National Commission on New Technological Uses of Copyrighted Works ("CONTU") Final Report, p. 13.

[12] H.R. Rep. No. 96-1307 (Part I), reprinted in 1980 U.S. Code Congressional and Administrative News 6460, 6482.

[13] Atari, Inc. v. JS&A Group, Inc., 597 F. Supp. 5, 9 (N.D. Ill. 1983) quoting Midway Mfg. Co. v. Strohon, 564 F. Supp. 741, 750 (N.D. Ill. 1983).

[14] CONTU Final Report, p. 13.

Early case law interpreting this section noted that the literal text of the statute required that the copy be created as an "essential step," thus the copy must be "no more permanent than is reasonably necessary."[17] However, latter decisions tend to support a more liberal reading of Section 117, which "is consistent with Congress's stated purpose of providing the copyright protection necessary to encourage the creation and broad distribution of computer programs in a competitive market."[18]

B. The Focus of this Study of the Impact of Section 117

The exemption set forth in Section 117 of the Copyright Act implicates at least three types of copying of digital media.

First, consumers should be able to make a back-up or archival copy or phonorecord of content that they acquire through digital downloading. Anyone who uses computers recognizes that their investments in media, like any software, can be lost in case of damage to a hard disk drive. Similarly, consumers who upgrade their computer systems every few years need some means of transferring their media to their new computer. DiMA believes that the principle is important, but the means for implementation may be as varied as in the case of today's computer software. For example, no archival copy is necessary if (as in the case of some DRM systems) the seller can replenish any media lost or damaged. As another example, for systems such as Liquid Audio, the ability to burn once to CD can serve as an appropriate archival copy.

Second, temporary copies of recorded content made in the course of playback also should be exempt from claims of infringement. This is no different than the case directly contemplated by Section 117(a). The computing device retrieves copyrighted material from a storage medium (such as a hard disk drive or a CD) and then loads the material into random access memory ("RAM") for processing and performance or display. This issue implicates virtually all digital devices and all media forms. Indeed, nearly every device for performing digital media incorporates some memory to process the content so as to make it perceptible, from portable CD players and "e-books" to high definition television sets.

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[15] See id.

[16] See Apple Computer, Inc. v. Formula International, Inc., 594 F. Supp. 617, 622 (C.D. Cal. 1984).

[17] See id.

[18] See CONTU Final Report p. 27. See also DSC Communications Corporation v. Pulse Communications, Inc., 976 F. Supp. 359, 362 (E.D. Va. 1997) ("The trend is to read Section 117 broadly").

Third, the technical process of Internet webcasting requires that the receiving device temporarily store a few seconds of data transmitted by the webcaster, before playing back the audio or video to the consumer. Data transmitted over the Internet arrives in small packets that need to be received and assembled by the receiving device. For data that is to be performed concurrent with its reception (such as "streaming media"), that data is collected in a segment of RAM that is allocated as a "buffer" for audio performance or display.

In the case of webcasting, the receiving device, using software such as the RealNetworks RealPlayer, collects in this RAM buffer a few seconds of data to guard against interruptions or delays due to line congestion or slow Internet connections. More particularly, when the user requests transmission of webcast media, the RealPlayer software on the user's receiving device communicates with the transmitting server and determines, given the quality of the media and the speed of the transmission, how many seconds of data should be stored in the receiving device's RAM buffer before beginning playback to the user. Higher quality media (that contains more data) will take longer to transmit, so more data will be accumulated in the buffer; similarly, more data will be accumulated where the user has a slow or congested Internet connection. The data in the RAM buffer cannot be accessed for other purposes within the receiving device; it can only be performed via the streaming media software. Once performed, the transmitted data leaves the buffer permanently and cannot otherwise be stored in a direct digital copy on the receiving device.[19]

Through use of this temporary buffer, the user experience from Internet webcasting approximates the smoothness of performances rendered by radio or television. Effectively, the need for a buffer is a technological accident owing to the design of Internet communications protocols. The buffer has no use to the consumer other than to facilitate those performances. Thus, where the performances are licensed, the use of RAM buffering has no additional impact upon the economic rights of copyright owners.

Each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the fair use doctrine. Notwithstanding, DiMA long has been aware that this view is not shared by certain copyright owners. Therefore, for the reasons set forth *supra* at I, DiMA believes that an explicit amendment to Section 117 could benefit all parties by clarifying the legal status of these temporary noninfringing copies.

C. Legislative and Regulatory Background of this Study

S. 1146, introduced by Senator John Ashcroft on September 3, 1997, would have amended Section 117 by providing explicitly in Section 117 that it is not copyright infringement to make a digital copy that is "incidental to the operation of a device in the course of the use of a work otherwise lawful" under Title 17.[20]

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[19] In this regard, where the streaming technology features this capacity, the disabling of direct digital copying of the data streamed during webcasting is a condition of the statutory webcasting license. See 17 U.S.C. § 114(d)(2)(C)(vi).

The scope of the temporary copying exemption, as relevant to Internet webcasting, reappeared on the radar screen in December 1997. Three Internet webcasters – AudioNet, Inc. (now Yahoo!/broadcast.com), RealNetworks, Inc. and Terraflex Data Systems, Inc. (now Spinner.com, which is owned by America Online, Inc.) – opposed the adoption of a broadly-worded rule, jointly proposed to the Copyright Office by the National Music Publishers Association and the Recording Industry Association of America, that could have applied the reproduction right (and a mechanical royalty at the statutory rate) to these temporary RAM buffer copies. Eventually, that language was withdrawn from the proposed regulation and the issue was deferred until the next arbitration period.

DiMA directly raised this issue in its June 8, 1998, testimony before the House Commerce Committee Subcommittee Telecommunications, Trade and Consumer Protection:

> Temporary copies made on a user's PC during Internet transmission, for a transitory period and to facilitate performance of the audio or video, should not be considered copyright infringement. Hundreds of thousands of hours of audio and video material now are available over the Internet. "Streaming media" technology is essential to making these Internet transmissions sound as smooth as over the radio. . . .
>
> ***If temporary RAM copies of those few seconds of material are deemed to be copyright infringement, and streaming media performances and technology could therefore be deemed unlawful, audio and video over the Internet will come to a grinding halt.*** H.R. 3048 addresses this problem by stating that temporary copying incidental to an otherwise authorized performance is not copyright infringement. We strongly support this measure as an absolutely integral part of this bill, and as essential for the future of the Internet.

Following that testimony, DiMA engaged with copyright owners in a series of discussions under the auspices of then-chair of the House Internet Caucus, Rep. Rick White, in an effort to craft a mutually-acceptable legislative exemption for these RAM buffers. When time ran out for those discussions, Congress incorporated into the DMCA Section 104, to study this issue as part of the overall interaction between Section 117 and new technological uses.

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[20] The Ashcroft bill proposed a new subsection (b) to section 117:

> (b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying--
>
> (1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and
>
> (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The 1997 Boucher-Campbell bill proposed the same language to address this issue.

With this background, DiMA responds below to the questions posed in the Notice, as relevant to each of the three types of temporary copying identified above.

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

Technological protection measures, such as the DRM tools provided by Liquid Audio and Reciprocal, can provide consumers the means to make a "back-up" copy of their digitally-downloaded content, in a secure manner that also protects the rights of copyright owners. However, technological protection measures could be applied so as to thwart the consumer's right to make such archival copies. Thus, Section 117 should provide consumers with the assurance that, in the ordinary course of purchasing content in a manner analogous to today's purchases in record shops, the law will not preclude them from making their archival copy.[21]

Technological protection measures should not affect the consumer's ability to playback media that the consumer has lawfully acquired. Devices licensed to perform the content will be equipped with the technologies to decrypt or otherwise access the content for playback.

Similarly, today's protection measures do not interfere with consumers' ability to enjoy webcast performances. Certain webcasting technologies (e.g., streaming in the MP3 format) use no protection measures, and so are unaffected by the provisions of Section 1201. For streaming systems that do implement protection, those protection measures have facilitated the growth of webcasting by assuring copyright owners that their works are secure against direct digital copying. The importance of such technological protection measures was acknowledged in RealNetworks v. Streambox, Inc.[22] There, the court issued a preliminary injunction against the distribution of the "Streambox VCR," a software product that circumvented authentication and copy protection measures implemented in the RealPlayer software so as to permit a Streambox user to record the streamed RealMedia files, against a copyright holder's wishes. The court's findings of fact specifically noted that a large number of copyright owners rely on RealNetworks' software to protect their content against duplication, and that the ability to circumvent this protection "would likely reduce the willingness of copyright owners to make their audio and video works accessible to the public over the Internet." Id. ¶ 26. Thus, DiMA believes that

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[21] DiMA would not suggest that archiving be applied to downloads that are not equivalent to a sale. For example, music acquired on a "try before you buy" basis or on a "pay per listen" service would not be subject to such provisions. But, as in the case of the current section 117(a), the *owner* of a digitally-downloaded copy should be able to make a back-up copy without being deemed an infringer.

[22] 2000 U.S. Dist. LEXIS 1889 (W.D. Wa. Jan. 18, 2000).

Section 1201 to date has not impeded webcasting, and that systems that implement technological protection measures have helped make more copyrighted works available to the public.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

DiMA believes that, at this stage, these prohibitions have had no effect on the operation of Section 117.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

DiMA believes that the growth of ecommerce -- and the vast potential opportunities it creates for copyright owners, technology developers and media companies -- demonstrates why Section 117 needs to be expanded to address all forms of digital content, and not just software.

First, as noted above, the growing popularity of digital downloading necessitates that the law continue to guarantee consumers the right to secure their investment in digital media. For consumers to embrace digital delivery, they must first be assured that the content they acquire will not be lost due to events such as server or hard disk crashes. Thus, Section 117 should permit the making of an archival or back-up copy of media acquired digitally, without branding consumers as infringers.

Second, virtually all devices that playback content recorded in a digital format must process that content by first loading all or some portion of it into memory. All devices that perform such digital media effectively are "computers," including CD players, DVD players and HD television receivers. Over the past year, consumers have begun purchasing new generation portable playback devices, such as MP3 players. By next year, playback of digital media will become pervasive in all handheld devices, including portable organizers, cellular phones and even wristwatches. In this new environment, recorded digital media are in the same position as was computer software in the 1970's -- at least some portion of these media need to be temporarily copied into RAM in order to be performed. Thus, Section 117 should be expanded so as to exempt the loading of all types of digital content into memory, as an essential step in accessing the content.

Third, webcasting technology demonstrates another reason why Section 117 needs to be updated for the digital age. The small temporary buffer memory copies used in today's webcasting technology have no intrinsic or economic value apart from the performance. Where the webcaster makes an authorized performance of copyrighted material, the temporary buffers necessary to enable that performance should be exempt from any claim of copyright infringement. In this regard, DiMA notes that the Copyright Office appears to have reached a similar conclusion in its study of distance education, resulting in the recommendation that the scope of the Section 110(2) exemption should be expanded to encompass "transient copies created as part of the automatic technical process of the digital transmission of an exempted performance or display." Report on Copyright and Digital Distance Education, supra at 146-7. The exemption from the reproduction right is all the more warranted for webcasting, where the same copyright owners of the musical composition, audiovisual work or the sound recording already will have authorized, and been compensated for, the performance of the works.

(d) ***What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?***

(e) ***To what extent, if any, is section 117 related to, or premised on, any particular technology?***

Section 117 was adopted to deal with a specific known technology then becoming more prevalent in the late 1970s. The basis for the exemption, as noted above, was the fundamental principle that the lawful owner of a copyrighted work ought to have the right to use it. In the case of computer software, the material objects that contained the computer code potentially could be damaged, and so the need was perceived for an archival exemption. Similarly, using the software required that all or some portion of the code be copied into temporary memory where the code could interact with and process other data, and so the need was perceived to exempt this temporary copying.

The result of CONTU's consideration was a limited provision that applied the principle in the context of a particular known problem. Congress, when adopting Section 117, could not then foresee all the potential applications of the underlying principles to future types of devices and media. Now, however, digital media other than software programs, and computing devices other than computers, are pervasive. Content other than computer programs is available to the consumer, is susceptible to loss, and cannot be used by the purchaser without temporary copying into device memory.

DiMA therefore believes that it is time to take cognizance of how the concepts underlying of Section 117 ought to be applied to new technologies and uses. We therefore strongly request that Section 117 be adapted and expanded to encompass the types of digital copying that are necessary and appropriate to the uses of digital media, and to the promotion of electronic commerce.

(f) ***To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?***

As noted above, although the language of Section 117 may have been premised upon a particular technological environment, the conceptual justifications for the exemption were founded on principles that have general application to the digital environment.

IV. DiMA's Views on the "General" Questions Posed by the Study

(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

Another issue squarely at the intersection of copyright and ecommerce relates to the application of Section 110(7) of the Copyright Act, the "retailer exemption" to online retailers. Section 110(7) exempts retail record stores from paying music license fees when they perform music in their stores "to promote the retail sale of copies or phonorecords of the work." Thus, when a consumer hears music playing in Barnes and Noble or Tower Records, these retailers are not required to pay performance license fees for such in-store play.

Online music retail businesses that market and sell copyrighted music (in physical form or by digital downloading) also allow the customer to hear the music (or, more commonly, a music sample) before buying. Most of these businesses allow the consumer to hear samples of virtually every song available for purchase. This unique facility of electronic commerce promotes consumer satisfaction and awareness of performing artists, as well as sales of copyrighted music.

However, some copyright owners contend that this exemption, adopted in 1976, should apply only to "brick and mortar" retail establishments, and does not and should not benefit online retailers. Such an interpretation unfairly discriminates against online retailers, encumbering ecommerce with additional license fee payments. Ironically, if it becomes expensive to provide music samples, then electronic retailers will offer fewer samples – slowing the growth of ecommerce, diminishing consumer welfare and potentially stifling the online music market.

To avoid prejudice to online retailers, DiMA believes that Section 110(7) should be amended in two respects to clearly exempt online retailers and retail services for similarly promotional performances, in two ways:

- First, the existing exemption is limited to performances in "establishments" that are not transmitted "beyond the place where the establishment is located . . . [or beyond] the immediate area where the sale is occurring." ***Section 110(7) should clarify that online record retail sites are the equivalent of physical "establishments," and that the transmission between the e-tailer and the consumer is equivalent to the "immediate area where the sale is occurring."***
- Second, the exemption was written before Congress created a copyright covering digital public performances of sound recordings. Therefore, ***the exemption should be extended to digital public performances of sound recordings in both physical and ecommerce record retail establishments.***

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

DiMA believes that hearings might be useful for the Copyright Office and NTIA to gain a more detailed understanding of the developing technologies and ecommerce business models and how they would benefit from the proposed changes to Sections 109 and 117. In particular, hearings would afford the opportunity to receive additional input regarding new technologies and emerging business models. DiMA and several of its members would be interested in participating in these hearings.

Respectfully submitted,

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Date: August 4, 2000

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Home Recording Rights Coalition

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE
Washington, D.C.

Report to Congress Pursuant to)
Section 104 of the) Docket No. 000522150-0150-01
Digital Millennium Copyright Act)

COMMENTS OF THE HOME RECORDING RIGHTS COALITION

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August 4, 2000

I. Introduction

The Home Recording Rights Coalition appreciates the opportunity to offer our perspective on the appropriate scope of the "first sale" doctrine in the digital era and the exemption from copyright infringement of archival copies and ephemeral copies of copyrighted works made in the course of authorized uses. In short, HRRC believes the first sale doctrine should be extended to cyberspace and that temporary caching or buffering of works should not be deemed copyright infringement within the meaning of the Copyright Act. We urge the Copyright Office and NTIA to support legislative and other efforts to update sections 109 and 117 of the Copyright Act for the digital era.

With respect to proposed changes to current law that could affect the interests of consumers in cyberspace, HRRC has offered these Core Principles for consideration by policymakers:

- Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place shifting, and other private, noncommercial rendering of lawfully obtained music and video content.

- Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal. Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.

- Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.

In response to the Federal Register Notice and the questions set forth therein, HRRC's comments below will elaborate on how the Copyright Office and NTIA can advance these core principles through this proceeding.

II. Background

As the Copyright Office's web site home page reminds visitors, the purpose of copyright is "[t]o promote the Progress of Science and useful Arts . . . ." As our founding fathers recognized, the purpose of copyright is not to enrich authors at the expense of consumers, but rather it is to benefit society as a whole. That laudable goal, as embodied in the Constitution, can best be achieved by balancing the interests of copyright owners and information consumers in adapting the law to changes in technology.

The first sale doctrine historically promoted that balancing of interests well, irrespective of changes in technology in the analog era. In our view, the first sale doctrine has not been and should not be premised on any particular media or methods of distribution. The emergence of new technologies should not alter the premises on which the doctrine was established. Thus, as originally proposed by Representatives Rick Boucher and Tom Campbell during the consideration of the precursor to the Digital Millennium Copyright Act, the first sale doctrine should encompass the digital distribution of works.

Similarly, section 117 of the Copyright Act has promoted the balancing of interests between copyright owners and information consumers using a variety of devices to view or listen to a variety of copyrighted works. Section 117 was adopted to deal with a specific known technology then becoming more prevalent in the late 1970s. The basis for the exemption was the fundamental principle that the lawful owner of a copyrighted should be able to use it. When adopting section 117, Congress could not then foresee all the potential applications of the underlying principles to future types of devices and media. Now, however, digital media other than software programs, and computing devices other than computers, have become pervasive. Content other than computer programs is available to consumers, is susceptible to loss, and cannot be used by a purchaser without temporary copying into device memory. Representatives Boucher and Campbell, as well as Senator John Ashcroft, recognized in 1997 the need to update the law to take into account these changes in technology as well.

HRRC recognizes that, in general, it is preferable to let the market evolve before recommending changes to copyright law. We also recognize that exemptions in the Copyright Act for the physical or analog world might be adapted in the digital realm by judicial interpretation or justified under doctrines such as fair use. Nevertheless, the public interest and the evolution of the marketplace may be served best when the law clearly addresses and defines the permissible uses of works in a new technological environment. HRRC believes that legal certainty in applying copyright to new digital technologies will benefit copyright owners and consumers alike, and will open the market to more exciting and compelling technologies and business models. Therefore, HRRC recommends that the Copyright Office and NTIA endorse the provisions of the Ashcroft and Boucher-Campbell bills that would have updated current law for the digital era.

III. The First Sale Doctrine Should Be Updated for the Digital Era[1]

The first sale doctrine has always been premised upon a balance between the incentive for copyright owners and the broader public interest in using copyrighted works. Although written in the analog era, the doctrine as embodied first in a statute was broad enough to anticipate future technological developments. Section 27 of the 1909 Act provided that "nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work, the possession of which has been lawfully obtained."

In 1976 Congress enacted section 109(a) to revise and expand the first sale doctrine. In recognition of the importance of updating the 1976 Act to eliminate any uncertainty about the proper scope of the provision (and to make other changes to current law), Representatives Boucher and Campbell introduced H.R. 3048, the Digital Era Copyright Enhancement Act, late in 1997. As Mr. Boucher explained in his statement accompanying introduction of the bill, "this legislation best advances the interests of both creators and users of copyrighted works in the digital era by modernizing the Copyright Act in a way that will preserve the fundamental balance built into the act by our predecessors throughout the analog era." Cong. Rec. at E2352 (Nov. 13, 1997) (daily ed.). This bipartisan bill--supported by 50 cosponsors--would have added to Title 17 a new section 109(f) that would have permitted the operation of the first sale doctrine by transmission of a work to a single recipient, if the person effectuating the transfer erased or destroyed his or her copy or phonorecord at substantially the same time. As proposed, section 109(f) would have read:

> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

Taking into account developments throughout the analog era, including the emergence of video rental stores, Mr. Boucher offered the following explanation of the purpose of the provision in his "Section-by-Section Analysis" of the bill:

> Section 4 would amend section 109 of the Copyright Act to establish the digital equivalent of the "first sale" doctrine. Under current law, a person

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For short-hand reference, in the discussion below, we refer to the digital transmission world as simply "digital" and the physical world as simply "analog," although the physical should be understood to include physical products containing content in digital form.[1]

> who has legally obtained a book or videocassette may physically transfer it to another person without permission of the copyright owner.
>
> Given the historical importance to libraries, scholars, educators, and consumers of transferring to others lawfully acquired copies of works, Section 4 would permit electronic transmission of a lawfully acquired digital copy of a work as long as the person making the transfer eliminates (e.g., erases or destroys) the copy of the work from his or her system at substantially the same time as he or she makes the transfer. To avoid any risk that the mere act of making the transfer would be deemed an infringing act under existing section 116 of the Copyright Act, Section 4 of the proposed bill states that the "reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement."

Id. at 2353.

At the time, this simple proposed change in current law was met with howls of protest. Even though the loaning of books by libraries had not destroyed the publishing industry and video rentals were producing greater financial returns than box office receipts, somehow it was felt that "digital made it all different." Questions were also raised about whether the technology existed to ensure the proposed law could be implemented as intended. (Notwithstanding evidence to the contrary, this was seen as a mission impossible to achieve.) As a result, the inevitable process of compromise left this provision for consideration at another time. In our view, the Copyright Office and NTIA would do well to recommend that Congress adopt the provision when it next updates the Copyright Act to bring it further into the digital era.

Whatever the situation in 1998, the technology to secure the first sale privilege exists today. Copyrighted content can be delivered to consumers with digital rights management (DRM) systems that enable secure electronic transfers of possession or ownership, and that protect against unauthorized retention of the transferred copy. Through technological processes such as encryption, authentication, and password-protection, copyright owners can ensure that digitally downloaded copies and phonorecords are either deleted after being transferred or are disabled (such as by permanently transferring with the content the only copy of the decryption key).

Clearly, as Representatives Boucher and Campbell recognized two years ago, fair use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place shifting, and other private, noncommercial rendering of lawfully obtained music and video content. They also should continue to be able to share lawfully acquired works with family and friends. Extending the first sale doctrine to the digital era will provide the incentive for development of newer, more flexible, and more efficient DRM tools that will allow consumers to exercise more fully their fair use rights. Products and services with substantial non-infringing uses, including those that enable consumers to electronically transfer works lawfully acquired and then deleted, should be deemed to be legal.

By explicitly extending the first sale privilege to digitally delivered works, HRRC believes that the law will promote the interests of consumers, copyright owners, and companies engaged in building the new digital economy. And it will do so in the way that historically has guided the evolution of copyright policy: by balancing the interests of copyright owners and information consumers.

IV. Section 117 Should Exempt Archival and Temporary Copying for Digital Media

Section 117 of the Copyright Act creates an exemption to copyright infringement for the owner of a computer program to make a copy it, as long as doing so is an essential step in utilizing the program or if the copy is for archival purposes. Reflecting the historical balancing of interests of copyright owners and information consumers, this exemption ensures the rightful owner of a copy of a computer program may use it freely without fear of copyright liability, while at the same time preventing a copyright owner from forcing a lawful owner of a copy to stop using the program.

Although written in the analog era, the exemption set forth in section 117 of the Copyright Act implicates at least three types of copying of digital media today. First, consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading. Second, temporary copies of recorded content made in the course of playback through buffering, caching, or other means also should be exempt from claims of infringement. Finally, because the technical process of Internet webcasting requires that a receiving device temporarily store a few seconds of data transmitted by a webcaster, before playing back the audio or video to the consumer, the law should recognize this process as well. HRRC submits that each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the doctrine of fair use. Nonetheless, to eliminate any legal uncertainty that could ultimately hurt the interests of consumers or that could stifle the development of new technology, HRRC recommends that the Copyright Office and NTIA support an explicit amendment to section 117 could benefit all parties by clarifying the legal status of these temporary non-infringing copies.

Fortunately, a legislative model already exists. Two bills introduced during the debate over the WIPO Copyright Treaties would have amended the Copyright Act to include a new section 117 (b). Both H.R. 3048, the Boucher-Campbell bill, and S. 1146, the Digital Copyright Clarification and Technology Education Act of 1997 introduced by Senator John Ashcroft, would have provided:

> (b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying—
>
> (1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and
>
> (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

As Mr. Boucher explained to his colleagues upon introduction of the measure, putting the provision in historical context:

> Given the architecture of computers and data transmission networks, the simple act of viewing a downloaded image or sending an e-mail message creates an incidental or ephemeral reproduction (e.g., in RAM or cache memory). Although such "ephemeral copies" are not stored permanently, content owners last year sought to get the same rights to control ephemeral reproductions as they enjoy regarding analog "hard" copies (or digital ROM copies) today. In fact, as originally drafted, Article 7 of the WIPO Copyright Treaty expressly provided that temporary reproductions should be considered the equivalent of hard copies and thus should be subject to proprietors' control. In response to strong opposition from both developed and developing countries at the Diplomatic Conference in Geneva in December, Article 7 was dropped from the treaty in its entirety.
>
> Section 6 of the proposed bill would amend section 117 of the Copyright Act to make explicit that it is not an infringement for a person to make a digital copy of a work when such copying is made incidental to the operation of a computer or other device in the course of the use of the work in a way that is otherwise lawful, as long as such copying does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Thus, for example, a person would not be subject to liability for viewing a copyrighted work on the World Wide Web

> simply because ephemeral copies of the work would have been made in the normal course of the operation of the Internet.

Id. at E2353. Senator Ashcroft as well pointed out the need for the measure as a means of updating current law to reflect the way in which the Internet functions. See Cong. Rec. S8729 (Sept. 3, 1997) (daily ed.).

In our view, the potential growth of electronic commerce--and the vast potential opportunities it creates for copyright owners, technology developers, hardware and software manufacturers, and media companies--demonstrates why section 117 should be expanded to address all forms of digital content, not just computer software. As noted above, virtually all devices that play back content recorded in a digital format must process that content by first loading all or some portion of it into memory. All devices that perform such digital media effectively are "computers," including CD players, DVD players, and HD television receivers. Over the past year, consumers have begun purchasing as well a new generation portable playback devices, such as MP3 players. More devices that make ephemeral copies will undoubtedly come to market in the next year, including a variety of handheld devices, such as portable organizers, cellular phones, and even wristwatches. In this new environment, recorded digital media are in the same position as was software in the 1970s. Like computer software, at least some portion of these media need to be temporarily copied into RAM in order to be performed.

Thus, as proposed by Senator Ashcroft and Representatives Boucher and Campbell, section 117 should be expanded so as to exempt the loading of all types of digital content into memory, as an essential step in accessing the content. Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Ephemeral copies made in the course of viewing or lawfully gaining access to a work have nothing to do with piracy. The law should make clear this distinction. To advance the interests of information consumers, while protecting the legitimate interests of copyright owners, the Copyright Office and NTIA should recommend that Congress adopt the proposed change to section 117.

V. Conclusion

Having urged the adoption of specific legislation, HRRC believes that hearings would be useful for the Copyright Office and NTIA to gain a more detailed understanding of emerging technologies and how they would be affected by proposed changes to sections 109 and 117. In particular, hearings would afford the Copyright Office and NTIA the opportunity to receive additional input regarding new technologies and emerging business models. HRRC would be interested in participating in hearings to explore legislative options for recommendation to Congress.

We look forward to working with the Copyright Office, NTIA, copyright owners, and information consumers to make recommendations to Congress to bring the Copyright Act into the digital era.

Charles Lee Thomason

Comments on the Effect of §§1202 and 1203 On the Operation of §§106 and 109 of Title 17.

The following comments are offered by Charles Lee Thomason, and are not to be taken as the views of the law firm of Thomason, Moser & Patterson, LLP or any of its clients.

Hereinafter are summary responses to some of the Specific Questions set out in the Notice at 65 F.R. 35673 (June 5, 2000), which are followed by general comments.

1. *Section 109*

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

As set out in the general comments below, the effect of §§1202 and 1203 in Title 17 is to create liability for unoriginal, uncopyrightable information. A midstream reseller who trades in authentic, lawfully-obtained copies of a work, may remove labels or packaging before resale upon the belief that he is an "owner", not of the copyrighted work, but an "owner of a particular copy" under §109(a). Without adequate notice, or on a mistaken that he is an "owner", or that he obtained from an "owner", the reseller may face liability if uncopyrightable "information" on the packaging has been removed or altered.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

If electronic commerce includes purchasing products using electronic ordering and payment means, then the first sale doctrine should be unaffected. As set out in the general comments below, it is widely suggested that electronic commerce is cause to entitle copyright owners more protection, but not to subject those protected rights to the first sale doctrine.

(d) What is the relationship between existing and emergent technology, on the one hand, and the first sale doctrine, on the other?

New technology that serves as media in which a copyrighted work may be fixed obtains the same copyright as is granted to art or to books. Perhaps because what is new is mysterious to some, they believe that "digital" technology is free of the limitation are not "Subject to sections 107 through 120"[1] of the Copyright Act.[2] This view of "digital" works forgets the statement in *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975) that "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

The premise of the first sale doctrine is not "technological". After a lawful first distribution by sale "or other transfer of ownership", the limited monoply of copyright ownership gives way to policies against restraints on alienation of property, and leave the distributor of copies to contract and U.C.C. remedies. As long as the U.S. has free trade between merchants and consumers for consideration, the premise of the first sale doctrine should be unaltered.

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[1] As provided in §106.

[2] "Section 106 of the Copyright Act confers a bundle of exclusive rights …subject to certain statutory exceptions." *Harper & Row v. Nations Enterprises,* 471 U.S. 539, 546-47 (1984).

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

The doctrine should not be expanded to digital transmissions, where no "particular copy" is transferred by sale of other transfer of ownership. Rather the first sale doctrine should be clarified to deal directly with the transactions described in §§106(3) and 109(a), so that its current vague and uncertain application is eliminated.

General Comments.

Prior to the Digital Millenium Copyright Act, only the "work" of original authorship and lawfully-made copies were accorded the exclusive distribution right that §106(3) protects. Copyright protection was not accorded to the separate, uncopyrightable labeling and packaging that accompanied the media in which the particular copy of the work was "fixed."[3] That was an adjunct of the tangible/intangible separation between the intangible "exclusive rights under a copyright" that are "distinct from ownership of the material object in which the work is embodied."[4]

The Digital Millenium Copyright Act, P.L. 105-304, 112 Stat. 2860, H.R. 2281, *codified in,* Title 17 U.S.C. §1201 *et seq*.,, (hereinafter the DMCA) extended federal protection to labels, stickers, notices, and identifying information that are not copyrightable. Submit a a bar code or a `not for resale' sticker to the Copyright Office for registration, and the application will not be

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[3] The Copyright Act expressly distinguished the work from the media in §202.

[4] 17 U.S.C. §202.

"entertained."[5] This addition was intended to "not require any change in the substance of copyright rights or exceptions"[6] that U.S. copyright laws provided.

The first-sale `exception' to §106(3) is most significant with respect to the distribution of copyrighted works. In §1202 of the DMCA, Congress added to the exclusive rights that protect the copyrighted work, further rights that protect "information conveyed" with a copy of the work, and the first sale doctrine may not negate those protections. The DMCA made "it unlawful ... to deliberately alter or delete" what collectively is defined as "copyright management information" (hereinafter CMI). Liability is imposed should one distribute copies on which "identifying information" about the author, or the work, or even information about conditions on "use" of the work, have been "removed or altered", and the statutory definition in §1202 of such "management information"[7] is broad.

> c) DEFINITION- As used in this section, the term `copyright management information' means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:
>
> (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
>
> (2) The name of, and other identifying information about, the author of a work.
>
> (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
>
> (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying

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[5] A "following are examples of works not subject or copyright and applications for registration of such works cannot be entertained: (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs…".

[6] Report to H.R. 2281. *Need cite*

[7] *See*, 17 U.S.C. §1202(c).

> information about, a performer whose performance is fixed in a work other than an audiovisual work.
> (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
> (6) Terms and conditions for use of the work.
> (7) Identifying numbers or symbols referring to such information or links to such information.
> (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

The "copyright management information" prohibitions apply to all copies of copyrighted works that come in packaging, "including" those distributed "in digital form." Further, sub-section (7) to §1202(c) encompasses the broader category of "number or symbols referring to such [copyright management] information", which includes UPC bar code sticker and many varieties of labels. The breadth of the defined "information" would make the CMI provisions applicable to:

- the identifying information on that "portion of the box sliced off" in *Disenos Artisticos v. Costco*, 97 F.3d 377, 379, 40 USPQ2d 1295, 1996 Copy. L. Dec. ¶ 27, 568 (9th Cir. 1996);
- to numbers or symbols printed on the packaging removed when "repackag[ing] the trading cards" in *Allison v. Vintage Sports Plaques,* 136 F.3d 1443, 1449, 46 USPQ2d 1138 (11th Cir. 1998);
- to the "UPC bar code and serial number labels" identifying the `academic' software in *Adobe Sys. v. One Stop Micro, Inc.* 84 F. Supp. 1086, 1088, 53 USPQ2d 2003 (N.D.Cal. 2000);

- to information identifying the "upgrade" software[8] products in *Novell v. Network Trade Center,* 25 F. Supp. 2d 1218, 1222 (D. Utah 1990)[9], *vacatur due to settlement,* 1187 F.R.D. 657, 658 (D. Utah 1990)[10];
- to any labels indicating "for export only" in *L'Anza Research Int'l v. Quality King Distrib., Inc.,* 98 F.3d 1109, 1118, 1997 Copy. L. Dec. ¶27,666 (9th Cir. 1996), *revs'd, Quality King v. L'Anza*, 523 U.S. 1250, 118 S.Ct. 1125, 140 L.Ed.2d 254, 45 USPQ2d 1961 (1998);
- to the identifying information on the "original Enesco outer carton" in *Enesco Corp. v. Price/Costco Inc.,* 146 F.3d 1083, 1084 (9th Cir. 1998);
- to printed terms in copyrighted manuals stating "the express condition that there be no disclosure to third parties." *Alcatel USA, Inc. v. DGI Technol., Inc.,* 166 F.3d 772, 778 (5th Cir. 1999);
- to digital information like the "codes identifying whether the compressed audio material is copyright protected" in *RIAA v. Diamond Multimedia Sys., Inc.,* 180 F. 3d 1072, 1074 (9th Cir. 1999);
- to the "information about …the DSC lock-out software" in *DSC Commmunications Corp. v. Pulse Communications Inc.,* 170 F.3d 1354, 1364, 50 USPQ2d 1001, 1999 Copy. L. Dec. ¶ 27,886 (Fed. Cir. 1998) *rev'sg* 976 F. Supp. 359 (E.D. Va. 1997), *cert. den'd,* 120 S.Ct. 286, 145 L.Ed.2d 240 (1999); and

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[8] The "upgrade" products were "identical in every respect except packaging and price" to the full-retail version. At 1222.

[9] Held that "transactions …from Novell through NTC to the end-user are 'sales' governed by the U.C.C. [and] the purchaser is an 'owner', [and such] transactions do not merely constitue the sale of a license." At 1230.

[10] Upon *vacatur*, the court "express[ed] no opinion as to whether the prior judgment of this court on the copyright issue should be vacated." At fn. 3.

- even to the "notice" of the `licensed-price' printed inside the book cover in *Bobbs-Merrill v. Isidor Straus*, 210 U.S. 339 (1908).[11]

These first-sale cases scrutinize the distribution right and the first-sale right. Because of the vague standards used to assess a first sale, these cases probably would have involved additional liability arising from §§1202 and 1203 of the DMCA had those provisions then been in force.

How the first-sale doctrine is applied determines whether the CMI protections and the DMCA liabilities will attach. The analysis of whether there was a "sale of other transfer of ownership" of a "particular copy" of a work proceeds upon a confusing set of legal and contractual standards that overlay uncertain factual inquiries. Several diverging forks in the path of analysis are encountered: is this a legal or a factual issue; did the work came via a §106(3) licensed distribution or a §109(a) sale; is the legal standard dependent upon federal law, or the varied common law of the states; are provisions in a distribution agreement contractual covenants, which involve contract remedies, or limitations on the scope of a copyright license; if a factual analysis is necessary, then what proofs determine what is the sale of the tangible copy as distinct from the license of the intangible work? Each such distinction likely will result in the difference between first-sale protections being enforced, or liability being imposed for handling products from which "copyright management information" has been "altered". Whether anyone favors or disfavors the first-sale doctrine or the DMCA, everyone should favor certainty in the application of the law. The CMI provisions and prohibitions threaten liability to merchants who distribute authentic, original, lawfully-made copyrighted works which they believe to have been obtained after a first sale. That liability "for each" product, which is additional to copyright infringement remedies, is severe considering the quantities that resellers handle.

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[11] In *Bobbs-Merrill*, the information conveyed (as defined in §1202(c)(6)) with copies of the copyrighted book specified as terms and conditions for use of the work that transfers at "less than $1" were infringing.

> (3) STATUTORY DAMAGES-
>
> (B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than $2,500 or more than $25,000.

In the Digital Millenium, all copyrighted works fixed in digital medium will be distributed commercially under written agreements. The Act needs to be provide exactly what needs to be considered to make license agreements identifiably distinct from sale agreements. The Copyright Act and DMCA will apply to protect and govern distribution that falls within the realm of license. Sales or transfers based on purely contractual covenants should trigger the first-sale protection, and so distribution subsequent to the first sale can be on market terms that may be unauthorized by the copyright owner, and free of the CMI provisions.

In gauging whether an agreement involves a sale or a license, recent Court cases draw a loose dichotomy between a sale that is unlimited, and every condition or limitation on sale as being thereby a license. Various factors prove the difference, but not in any uniform way. In *Adobe Sys. v. One Stop Micro, supra,* the Judge ruled on summary judgment as to the "intent" behind the copyright owner's "Reseller Agreement", then rectified a latent "ambiguity" in its express terms based on "parol evidence" including "evidence of trade usage." *Id.,* 84 F. Supp. 2d at 1090-91. He reached the copyright issue using extrinsic evidence, and in the face of an express merger clause, without having to consider Federal law. This was because Califonia's "exception to the parol evidence rule is broad." *Id.*, at 1090.[12] Some question whether varying state law concepts provide a sound legal ground for determining federal rights in a uniform way. The factors considered in *DSC Commmunications Corp. v. Pulse Communications Inc.*, 170 F.3d 1354, 1364 were the general indicia that were believed to distinguish a sale from a license[13], specifically that the "transaction involves a single payment, giving the buyer an unlimited period in which it has a right to possession", 976 F. Supp. At 362-363, and that the copy was obtained "for a single payment and an unlimited term" 170 F.3d at 1360.[14] The District Court agreed with a leading treatise, and the Circuit disagreed with both of them. It can be asked, how would a citizen know whether they own the "particular copy" that they purchased from a reseller. Next, another test used to separate a licensed transfer from a first sale considered "the parties' course of performance and usage of trade" in *Green Book Int'l Corp. v. Inunity Corp.*, 2 F. Supp. 2d 112, 116 & 120, 2000 Copy. L. Dec. ¶28,005 (D. Mass. 1998). This was essentially a U.C.C. analysis. Also, in *Novell v. NTC, supra,* the U.C.C. was applied to decide that the transfer of "upgrade" software was a sale. None of these cases applied the same factors. Yet all manner of products are distributed in the same manner. Bookstores, both at the mall and online, sell books, art, videos, and software which are protected by copyright. Yet when the courts see a case involving computerized technology, the "particular copy" that went through the same channels of commerce as the books and videos is viewed as entitled to special rights, and only subject to some new version of the first sale doctrine.

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[12] *Compare, Step-Saver, supra,* at 95, where applying the U.C.C. parol evidence rule, the court "granted a motion in limine to exclude all evidence of earlier oral and written" representations.

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[13] In *Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 447 (9th Cir. 1994), a "license to distribute ITC's typefaces" that required that "each company paid ITC a royalty fee for each ITC typeface it distributed."

[14] The District Court and Federal Circuit quote Nimmer, *Law of Computer Technology,* but the Circuit Court finds the single-payment unlimited-term" test for a sale to be "overly simplistic." Professor Nimmer, who is listed as counsel of record in *DSC v. Pulse*, expanded his view when quoted in the *Adobe v. One Stop* decision at 84 F. Supp.2d at 1091-92.

Consider further that by definition, CMI could state "term and conditions for use" that may be claimed to constitute a license, which would take the product outside of the first-sale provisions. If a particular copy of the work is lawfully distributed with a sticker on it that states "Terms and conditions for use of the work"[15], then those terms may transform a sale of that copy into a license limited by those "conditions." It would be fair argument that such terms and conditions are "a restriction [that] is plainly at odds with the section 109 right to transfer" *DSC, supra.* In the *Adobe, supra* case the Court enforced the "terms" on a label on the package that identified it for 'academic' sale only. 84 F. Supp. 2d at 1093. The copyright owner may have no agreement for distribution, but can create a license by "identifying information" that is "conveyed with" copies of his work. While that is the extreme case, it recalls the "notice" inside the book cover in *Bobbs-Merrill* – what if that page was ripped out, so that the book could be sold for an unauthorized price – would the Supreme Court's first sale ruling in that case then change? Perhaps not, but this illustrate the conflict between the first sale doctrine and protection for "copyright management information" that, even after the first sale, would have to remain upon each particular copy of the work. The user should be free to remove "copyright management information" such as when opening and discarding packaging material, or when utilizing the program by deleting unwanted utilities in the software.

Copyright License or Contractual Covenant.

In assessing the applicability of the copyright law and its remedies, a threshold question is whether the challenged act was a violation of rights protected by copyright or a breach of a contractual limitation. Before a copyright holder "can gain the benefits of copyright enforcement, it must definitively establish that the rights it claims were violated are copyright, not contractual, rights."[16]

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[15] 17 U.S.C. §1202(6).

Presume that I wanted to distribute freeware, for example, the LINUX OS. I author an original package that I copyright, in which the diskettes and my copyrighted instruction sheet are placed for distribution. On the outside of the box I affix a sticker, stating the terms and conditions for use: '$10 retail, but free to users of WIN 98'. The stickers get peeled off, and my product becomes widely available for no less than $10. Compare that to where there is copyrighted software packaged in a plain white box with a label stating 'UPGRADE - For registered users of Version 3.0.' The CMI liability is the same, but in the first case, only the box is copyrighted, where the second case involves the copyrighted goods inside the box. My LINUX product may be distributed without any written agreement, while the upgrade case probably would be governed by written terms. No sound reason exists to consider either case or both differently under the first sale doctrine. The present lack of clarity in the Act leaves open how each case would be decided. In application, whether someone can distribute a particular copy of a work upon which "identifying numbers or symbols" have been altered or removed is a preliminary question that may beg for a first-sale answer that is unclear as the present statute is applied.

A worthwhile revision would be an amendment that requires license grants or sale terms to be stated in certain terms, and that the first sale issue to be decided according to a uniform federal standard. Now, by denying a copyright owner the authority to control the terms of a purchaser's subsequent effort "to sell or otherwise dispose of" his particular copy[17], the first-sale statute creates incentives to craft around its applicability.[18]

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[16] *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121-22 (9th Cir. 1999), *on remand,* 2000 WL132711(N.D. Cal. 1/25/2000).

If federal rights based on copyright were governed by federal law, then much of the vagaries of the first sale doctrine would be eliminated. The federal rights would be made clear, and the rest would be identifiable as state contract law issues. [19] In a given situation, removal of labels may be prohibited in a distribution agreement, and enforced by contract law, rather than under the Copyright Act.

Does the Copyright Clause enable Congress to extend copyright protection and remedies to "copyright management information"?

We "must remember" that the "principal function" of copyright laws passed under the authority of Article I, Section 8, clause 8[20] "is the protection of original works, rather than ordinary commercial products". *Quality King v. L'Anza* (1998). The bar codes and UPC stickers bearing identifying "numbers or symbols" on copyrighted product material are not copyrightable, nor registerable, nor "original". *Feist Publ., Inc. v. Rural Telep. Svc. Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282, 113 L.Ed.2d 358 (1991)(affirming that Copyright Act understood to protect original works of authorship and "to prohibit any copyright in information"). In general, a large measure of what the DMCA defines as "copyright management information" cannot be considered "Writings" under the Copyright Clause. *Goldstein v. California,* 412 U.S. 546, 561, 93 S.CT. 2303, 37 L.Ed.2d 163 (1973)("[W]ritings …include any physical rendering of the fruits of creative intellectual or aesthetic labor."). The argument can be made that the Copyright Clause does not enable Congress to grant exclusive rights to authors for unoriginal, ordinary commercial labels or text that the DMCA defines as "copyright management information." Some further consideration may be given to whether this unregisterable, uncopyrightable "identifying information" is due protection even for "Limited Times". *Pennock v. Dialogue,* 27 U.S. (Pet.) 1, 16-17, 7. L.Ed. 327, 333 (1829).[21]

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[17] 17 U.S.C. § 109(a).

[18] *Step-Saver Data Sys., Inc. v. Wyse Technol.*, 939 F.2d 91, 95 (3d Cir. 1991)("form licenses were first developed for software …to avoid the federal copyright law first sale doctrine.")

[19] J.H. Reichman, Jonathan A. Franklin, *PRIVATELY LEGISLATED INTELLECTUAL PROPERTY RIGHTS: RECONCILING FREEDOM OF CONTRACT WITH PUBLIC GOOD USES OF INFORMATION*, 147 UPALR 875, 884 (1999)(noting that adhesion contracts to create use and distribution rights for copies of works amounts to private legislation), "routine validation of mass-market access contracts and of non-negotiable constraints on users would tend to convert standard form licenses of digitized information goods into functional equivalents of privately legislated intellectual property rights. [fn. om.] Firms possessing any degree of market power could thereby control access to, and use of, digitized information by means of adhesion contracts"...

[20] Congress may legislate to "promote the Progress of Science and the useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

CONCLUSION

I have taken time away from my practice to prepare these comments because, without the first sale doctrine, the risk of unreasonable expansion of the limited copyright monopoly is presented. While merchants will find new products and new ways to distribute them, the best interests of the market and those who buy copyrighted products should be served by a uniform, federal standards that define and preserve the first sale doctrine.

In closing, I respond to the final question in the Notice.

(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

Hearings should be conducted to establish a complete record. I would be willing to participate.

Respectfully submitted,

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[21] The "limited scope of the copyright holder's statutory monopoly, like the limited duration required by our Constitution, reflects a balance of competing claims upon the public interest." *Princeton Univ. Press*

Charles Lee Thomason

Attorney at Law

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v. Michigan Doc. Svc., Inc., 99 F.3d 1381, 1395 (6th Cir. 1996), *en banc, quoted by,* J. Merritt, dissenting, from *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Future of Music Coalition

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August 4, 2000

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Re: **The Future of Music Coalition's Comments Regarding the Digital Millennium Copyright Act**

Reference is made to the United States Copyright Office's and the National Telecommunications and Information Administration's (NTIA) request for public comments regarding the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, (``DMCA") as contained in the June 5, 2000, Federal Register, pp. 35673-35675.

On behalf of the Future of Music Coalition, we hereby submit our comments. The Future of Music Coalition (http://www.futureofmusic.org) ("FMC") serves as a clearinghouse for research on music technology issues and advocates on behalf of musicians and independent record labels in Washington, D.C. We are composed of leaders from technology and music who came together to confront the issue of how new digital media distribution will impact the creative community. The FMC, among other things, is concentrating on three pressing areas of concern: i.) what is the recording artist's true stake in the ongoing Napster/Gnutella/Scour dispute considering the perceived inevitability of widespread peer to peer file sharing abilities; ii.) the inability of the Recording Industry of America (RIAA) to represent recording artists' interests (particularly in the all important and under reported Digital Performance Rights in Sound Recordings [DPRSRA] debate); and iii.) how secure digital distribution formats (e.g., SDMI [the "Secured Digital Music Initiative"]) could threaten educators' and academics' access to recorded music and, therefore, jeopardize legitimate educational "fair use".

The FMC chooses to answer the second, or more precisely, the "General" question posed in the June 5, 2000, Federal Register. The legislative intent of Title I of the Digital Millennium Copyright Act was twofold: to further harmonize world intellectual property law and to provide greater protection for digital or electronic copyrighted work. The FMC believes that in order to promote the purpose of the DMCA, two important points must be made.

First, the Congress, the United States Copyright Office and the NTIA should coordinate with the European Economic Community (EEC) in its current efforts to monitor the growth of digital music distribution within its jurisdiction. If the United States does not take note of the EEC's findings, the lack of coordination amongst and between WIPO members could easily frustrate the economic growth of the Internet and leave recording artists, the music industry and consumers in the lurch.

Second, it is imperative that the Congress, the United States Copyright Office and the (NTIA) establish a fair and reliable criteria for distributing DPRSRA monies. The FMC cannot emphasize this point enough. Several commentators have suggested that DPRSRA royalties paid to the Copyright Office should be treated in a manner similar to that of AHRA/DART (American Home Recording Act; Digital Audio Recorder and Tape) monies. Although the DMCA and the AHRA both intend to distribute royalties monies to sound recording copyright holders, there is a serious flaw in the law of a fair and accurate methodology to determine what each sound recording copyright holder is actually owed. Under the current AHRA formula, some sound recording copyright holders are treated unfairly because no system has been implemented that accurately calculates with absolute certainty how many CDs have been sold, and, consequently, how much each sound recording copyright holder is owed. This problem is only exacerbated by the fact that unless sound recording copyright holders apply for AHRA money directly, what royalties would have been due them are actually paid to other parties after their money has been put back into the pool and redistributed to those parties that had gone through the requisite filings.

The FMC would argue that, in fact, the AHRA pool is what is known as a "black box," where, through flawed accounting and registration procedures, independent artists are under represented, and the attempt to take the AHRA criteria and apply to DPRSRA monies would only create a larger "digital black box." It is unacceptable to perpetuate an apparently flawed methodology that penalizes less sophisticated and undercapitalized sound recording copyright holders. There is great evidence to suggest that innovations in data collection technologies would allow for more accurate auditing trails. Furthermore, if legislative intent underlying the solicitation of public comments is to make all information regarding the DMCA transparent, then all of the details, no matter how seemingly minor, regarding AHRA (and any proposed DPRSRA) royalty collection, calculation and distribution should be made completely available to the public.

Finally, the FMC would also like to conclude by briefly mentioning our concerns regarding the Anti-Circumvention provisions of the DMCA. We are troubled by the possibility that the implementation of SDMI type technologies could deprive educators and researchers from their access to music. It has always been a part of our nation's cultural and legal history that academics should have access to music under traditional notions of "fair use." This should apply to institutions as diverse as the MIT Media Labs and the elementary schools where our children first learn about music. The laws that attempt to protect legitimate copyright holders should not penalize our students and the men and women who teach them.

The FMC states categorically that hearings are absolutely necessary in the preparation of your report to Congress. We would be prepared to have our technological, academic and legal experts be at your disposal for such hearings.

We greatly appreciate being allowed to participate in this process and we applaud your efforts.

Best regards.

Very truly yours,

Walter F. McDonough, Esq.
Future of Music Coalition

cc: Michael Bracy, Jenny Toomey, Brian Zisk, the Future of Music Coalition
Marybeth Peters, Register of Copyrights, United States Copyright Office
Kathy D. Smith, Chief Counsel, NTIA

LXNY

1. Sect 109

(a) DVDs are being produced that are deliberately encrypted. The perpetrators of this are attempting to use DMCA to protect their encryption and enforce restrictive licensing terms. Some DVDs are given ``region codes'' that would block playback, even for the original purchaser. This restricts the purchaser to playing the purchased disc only on a licensed DVD-player and in a restricted geographic area.

(b) Privacy concerns demand that anonymity be possible, even if this disables copyright management schemes. When they conflict, human rights are of higher value than profit. It is incumbent on copyright owners to only use copyright management that is compatible with the rights of individuals, of businesses and of organizations, and approaches that violate society's legitimate interests should not be permitted. There should not be carte blanche for copyright management.

(d) If such practices (per answer to (a) above) are permitted, how long will it be before players and discs are restricted to particular hours or rooms or number of plays? Automobiles and domiciles will soon be Internet-enabled. If linkage of copyrighted materials to external conditions is permitted, won't this lead to product tie-ins?

If this is allowed for DVDs, it could be allowed for electronic ``books''; these have already appeared in proprietary formats.

In this context, note the following trends:

1. major U.S. book publishers bought by large corporations.
2. Large-scale mergers and acquisitions are being permitted, even in industries critical to civil society, such as book distribution (e.g., Barnes and Noble with Ingram), telephone carriers, cable television operators, radio and television stations, banking.
3. Databases being accumulated of personal data.
4. Recent legislation: WIPO, DMCA, UCITA, ...

Do these boost special interests at the expense of freedom? Will libraries be weakened?

1. Sect 117. Multiple backup copies are needed.

Backup programs backup computer files. These programs have no knowledge of the license status of these files. There is no commonly used file system that stores such status with the files, so that there is no way (within common practice) for backup programs to ascertain that status. Organized backups are made according to schedules, and to enable recovery. For example, backups may be made daily, weekly, monthly, yearly. Each tape (of the ``full backup'' type) would contain a copy. Although tapes are generally recycled, there are often legitimate reasons to preserve tapes.

Example: databases and programs have multiple versions, and tapes allow restoration of files from a given time with the version extant at that time.

There should be no limitation on the number of archive copies.

Archives have at least two purposes: to preserve (generally older) data offline and to fix the data as a quasi-permanent record. It may be necessary to store the programs with the data to insure subsequent retrieval. Later versions (often labeled as ``upgrades'') may be unable to read the older data or may be deficient in features that work in contemporary versions. Contemporary programs may be unavailable when needed to access the archive (``out-of-print''). Archives may be split, e.g., if part of a business is sold, necessitating program replication.

Computer sites maintain their own copies and often contract with off-site warehouses and even duplicate facilities so that flood, fire, hurricane, act of war, etc. will not disrupt an operation.

(d)Technological developments: Continuous backups can be made. Distributed systems spread copies over networks. Online storage costs have fallen so that online storage, optical, magneto-optical and magnetic disks are being used instead of tape by many computer sites. This puts backup online, increasing its capabilities.

2.(a)(1). The DMCA is being used to extend the scope of copyright. In granting a copyright, the United States government grants an 'exclusive right' to the copyright owner. This exclusivity constitutes a government-backed monopoly. In ordinary antitrust law, leveraging a monopoly in one place to exert untoward pressure at a different point is prohibited. In addition to the copyrighted work, DMCA protects the technological measures being used by the owner to prevent infringement. This allows copyright owners to try to bundle other, non-copyright products with the copyrighted work, and employ technological measures, ostensibly for the copyrighted work to all bundled ancillary products.

Example: Members of the MPAA are using DMCA to lock the content of DVDs that they are producing. Already having a monopoly, they are then adding other products to the DVD, to wit, commercials. The licensing of DVD-players, also through the DMCA, blocks the development of DVD-players that allow the person viewing the content to control the viewing condition, viz., to have DVD-players that can skip the commercials.

2.(a)(2). In general, DMCA encourages the tying of other products, especially devices, to copyrighted works. A frequent topic of discussion among LXNY members is the potential copyrighting of computing machinery (such as the BIOS) so that manufacturers could create ``DMCA-monopolies'' that would make the use of unlicensed or unauthorized software on purchased equipment a crime.

Example: Computers might then be sold that would not allow the Operating System of your choice to be used.

2.(a)3. Constitution.

The United States Constitution: Article I Sect. 8
Section 8. The Congress shall have power

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Congress only has the power to grant copyrights for the purpose of progress. It does not have the constitutional authority to grant copyrights to amplify the profit potential of applicants, typically at others expense.

Exclusive rights, when applied to computer software, if used inappropriately, can easily prevent the 'progress of science and useful arts'. These problems, and the unequal weight of the two goals of progress and of business, need to be kept in mind.

Example: Debugging a program may require access to and mutability of the program source.

Example: Programs need to be able to work conjointly.

2.(a)4. General Comments:

DMCA gives one the impression of 1) attempting to use governmental power to prolong the profitability of business models made obsolete by technological progress and changes in society, and 2) giving a higher priority to enforceability (of copyright) than to protecting human rights, constitutional rights and consumer rights (including businesses as consumers).

The problems with proprietary software, some mentioned in these comments, stand in contrast to free software, where copyright is used to ensure unlimited copying, access to all, the ability of different parties to work together for `progress of science and useful arts,' and for a greater economic benefit.

Reference: For information on the free software movement, www.gnu.org .

2(b). Hearings would be useful. I would be available.

American Film Marketing Association, Association of American Publishers, Business Software Alliance, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America

VIA ELECTRONIC MAIL

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August 4, 2000

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RE: Report to Congress Pursuant to Section 104 of the Digital
Millennium Copyright Act
65 Fed. Reg. 35673 (June 5, 2000)

Dear Messrs. Feder and Joyner:

The undersigned copyright industry organizations appreciate the opportunity to comment in response to the above-referenced Federal Register notice.

Each of the undersigned organizations has a strong interest in the issues which Congress, in section 104 of the Digital Millennium Copyright Act (DMCA), instructed the Copyright Office and the NTIA to evaluate. The member companies of each organization are actively involved in electronic commerce, in the development and implementation of new "emergent" technology, and in the distribution of copyrighted materials that are subject to the first sale doctrine codified in section 109 of the Copyright Act (17 USC 109). Several of the copyright industry sectors represented by the undersigned organizations are directly affected by the rental right provisions of section 109, and by the exceptions in section 117 of the Copyright Act, 17 USC 117, to the exclusive reproduction right in computer programs.

In our view, no changes to sections 109 or 117 are needed at this time. We believe these statutory provisions are functioning as intended, to promote the efficient distribution of copyrighted materials (section 109) and the creation, development and distribution of computer programs (section 117) while preserving the legitimate rights of authors and of users of their works. Specifically, we do not believe that either of these provisions needs to be changed at this time in order to facilitate the continued growth of electronic commerce and the advance of technology for conducting electronic transactions in copyrighted materials. We are, of course, interested in reviewing proposed changes that other submitters of comments may offer, and reserve the right to provide further views, either individually or collectively, in the reply round of this proceeding, and in testimony at a public hearing if the agencies decide to hold one.

Background of the Section 104 Study

Some background on the genesis of the section 104 study may provide a useful context for our perspectives.

Section 109

The impact on the first sale doctrine of the emergence of digital networks as a medium for the distribution of copyrighted works has been the subject of analysis and discussion for some time. The issue was addressed briefly in the Green Paper prepared by the Administration's Information Infrastructure Task Force in July 1994, and in greater detail in the White Paper issued under the same auspices in September 1995. The White Paper summed up the situation as follows:

> The first sale doctrine allows the owner of a particular, lawfully-made copy of a work to dispose of it in any manner, with certain exceptions, without infringing the copyright owner's exclusive right of distribution. It seems clear that the first sale model – in which the copyright owner parts company with a tangible copy – should not apply with respect to distribution by transmission, because transmission by means of current technology involves both the reproduction of the work and the distribution of that reproduction. In the case of transmissions, the owner of a particular copy of a work does not "dispose of the possession of *that* copy or phonorecord." A copy of the work remains with the first owner and the recipient of the transmission receives another copy of the work.

White Paper at 95 (emphasis in original; footnote omitted). The White Paper reviewed, and ultimately rejected, the arguments of those who asserted that the first sale doctrine, as codified in section 109, should be either expanded or contracted because of the emergence of digital networks over which copyrighted works could be distributed. It recommended no changes to section 109.

The first sale issue was also extensively debated as Congress considered the legislation which ultimately became the DMCA. Representative Boucher prepared amendments on this topic for consideration both by the House Judiciary Committee in April 1998, and by the House Commerce Committee in June of that year. In both versions, the amendment would have created an exception to the exclusive reproduction right for reproductions made when an owner (or a person authorized by the owner) of a lawfully made digital copy or phonorecord of any work "performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time." Neither panel adopted such an amendment, and the DMCA ultimately made no change to section 109.

The current study had its genesis in an amendment offered by Representative White and adopted by the House Commerce Committee on July 17, 1998. That amendment, which became section 205 of the DMCA as reported by the Commerce Committee, called for a general review of the copyright law and its relationship with electronic commerce "to ensure that neither copyright law nor electronic commerce inhibits the development of the other." Sec. 205(a), H.R. 2281 as reported. Before the DMCA reached the House floor on August 4, 1998, this review had been scaled back to focus particularly on sections 109 and 117. In the House Manager's Report which provides the authoritative explication of the DMCA as it passed the House, Chairman Hyde explained the revised provision (section 105 of the House-passed bill) as follows:

> The first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or otherwise dispose of the possession of that copy. Rather, "disposition" of a digital copy by its owner normally entails reproduction and transmission of that reproduction to another person. The original copy may then be retained or destroyed. The appropriate application of this doctrine to the digital environment merits further evaluation and this section therefore calls for such an evaluation and report.

House Manager's Report at 24, 46 J. Copyr. Soc. 631, 657 (1999). The conference committee made no substantive changes to this section and it was enacted as section 104 of the DMCA.

Section 117

Although the DMCA left section 109 completely unchanged, Title III of the DMCA amended section 117. This amendment originated in the House Judiciary Committee, which stated that it had "the narrow and specific intent of relieving independent service providers … from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made." H. Rpt. 105-551 (Pt. I), at 27. The House Manager's Report adds that "[t]he impact of the use of encryption and other technologies on [the] limitations [provided by section 117] also merits further evaluation and this section [section 104 as enacted] therefore calls for such an evaluation and report." Id., at 24. This appears to be the only relevant legislative history, and neither the Green Paper nor the White Paper discussed section 117 in any detail.

Discussion

The background summarized above makes evident the intended focus of this study. Congress had heard concerns that the codification of the first sale doctrine in section 109 might need to be modified in order to facilitate the growth of electronic commerce in copyrighted materials. It was aware that the comprehensive study culminating in the White Paper had concluded that no such modifications were needed, and it had itself declined at least two invitations to expand section 109 to provide, for the first time, a new exception to the reproduction right to copies made in the course of electronic transmission of copyrighted works. However, while unpersuaded of the need for any change to the first sale doctrine at the time of enactment of the DMCA, Congress was well aware of the rapid and unpredictable course of change in the digital marketplace. Consequently, it built upon the White amendment, which stressed the need for a complementary relationship between electronic commerce and copyright protection, and adapted the study which it called for, to focus it on a limited menu of issues, including first sale.

Congress called for a report on section 109 because, although concerns had been raised, no dispositive evidence was presented of a specific problem that required a legislative fix. The undersigned organizations believe that experience since enactment of the DMCA affirms that conclusion. Indeed, the analysis of the first sale issue contained in the White Paper five years ago remains essentially valid. While, of course, there have been many technological changes in the past half-decade, it remains true throughout the digital networked environment that distribution of copyrighted material virtually never occurs without a prior reproduction of the material. It is the copy, not the original, which is distributed. The first sale doctrine defines the circumstances under which the distribution may take place without the consent of the copyright owner; but it would be inappropriate and unjustified to expand that doctrine to establish a new category of copies which may be made without that consent. Of course, since the copy in question is a perfect copy, as well as a potential master for the production of an unlimited number of additional perfect copies, all of which can conveniently be redistributed over digital networks to a virtually limitless class of recipients, the consequences of an unjustified expansion of the first sale doctrine could easily overwhelm the incentives for production of creative works provided by the copyright law.

In our view, the enactment of the DMCA, and specifically of the anti-circumvention provisions of 17 USC 1201, do not alter the validity of the conclusions reached in the White Paper. Those who argue to the contrary may be failing to distinguish between the physical possession and ownership of a tangible object embodying a copy of a copyrighted work, and the authorization to access or make specified uses of that work. Section 109 governs only the first; restrictions on the second are a central feature of many familiar business models that comfortably coexisted with section 109 before enactment of the DMCA and that continue to do so. To the extent that copyright owners use effective technological measures to implement these restrictions, section 1201 provides a degree of protection against those who create or traffic in the tools to circumvent those measures. None of this affects the first sale doctrine, which should remain in place for distribution of tangible copies, but which has only a very limited applicability to online distribution, as explained above.

Similarly, we are unaware of any significant impediments to electronic commerce which have arisen as a result of section 117. This provision was first enacted twenty years ago, upon the recommendation of the National Commission on New Technological Uses of Copyrighted Works (CONTU); it remained essentially unchanged until 1998, when it was amended by the DMCA, as described above. Those amendments appear to be functioning as intended. To the extent that misinterpretations of other aspects of section 117 have been employed by some, not as a legitimate defense to infringement, but as an enticement to engage in online piracy, the report under section 104 of the DMCA should be an appropriate vehicle for dispelling this confusion.

Thank you once again for the opportunity to comment on these important matters. We look forward to reviewing the comments of other interested parties on both section 109 and section 117.

Respectfully submitted,

AMERICAN FILM MARKETING ASSOCIATION

ASSOCIATION OF AMERICAN PUBLISHERS

BUSINESS SOFTWARE ALLIANCE

MOTION PICTURE ASSOCIATION OF AMERICA

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

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NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE

In Re Request for Public Comment)
In Preparation for Report to)
Congress Pursuant to Section 104) Docket No. 000522150-0150-01
of the Digital Millennium Copyright)
Act)

JOINT COMMENTS OF NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS AND VIDEO SOFTWARE DEALERS ASSOCIATION

National Association of Recording Merchandisers, Inc. ("NARM")[1] and Video Software Dealers Association, Inc. ("VSDA"),[2] hereby submit Joint Comments pursuant to the Notice of the Copyright Office and the National Telecommunications and Information Administration of the Department of Commerce ("NTIA") in the above-referenced matter, initiated June 5, 2000, 65 Fed. Reg. 35673.

NARM and VSDA are the two trade associations representing the vast majority of retailers and distributors of home entertainment products to the American consumer. These home entertainment products, which constitute "copies" or "phonorecords" under the Copyright Act, consist primarily of sound recordings, motion pictures, and video games. Although NARM and VSDA members typically do not own any copyrights in the copies and phonorecords that they sell, rent or otherwise distribute, they are by far the primary sources for delivery of copyrighted home entertainment to consumers. An increasing number of their members are also engaged in the digital transmission of copies of these works in digital form over the Internet through the authorization to manufacture ("download") them onto tangible media either in stores or consumers' homes.

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[1] NARM is the principal trade association representing retailers and distributors of sound recordings in the United States. Its members are engaged in the distribution and retail sale of digital music in pre-recorded format and through digital distribution.

[2] VSDA is the principal trade association representing retailers and distributors of home video entertainment, including both rental and sell-through of motion pictures on cassettes (VHS tape) and Digital Versatile Disc ("DVD"), and video games.

NARM and VSDA members are in the unique position of supporting technological measures for some purposes but not others. On one hand, they share the copyright owners' interest in combating piracy of copyrighted audiovisual works, sound recordings and video games with the most effective technological controls available. On the other hand, they share the consumer interest in enjoying all rights to ownership in lawfully made copies and phonorecords made possible by the exhaustion of the copyright owner's distribution right under the first sale doctrine and Section 109 of the Copyright Act,[3] and object to the use of technological measures used to circumvent those rights.

SUMMARY OF NARM AND VSDA POSITION

There are two major themes in the Joint Comments. First, NARM and VSDA challenge the false premise that the first sale doctrine does not or may not apply to "digital transmissions" or "works in digital form." We take strong exception to the premise upon which the questions in the Request for Comment appear to be based, because the questions suggest that there may be some doubt whether the first sale doctrine applies to digital works, or works distributed in digital form. Congress did not make that assumption, but inquired only into the effects the Digital Millennium Copyright Act ("DMCA"), electronic commerce and associated technology might have on the existing first sale doctrine. Section 109 applies to "copies or phonorecords," which, by definition, include digital copies or phonorecords without regard to where or how they were created. In sum, the first sale doctrine already applies to digital media, and the appropriate inquiry is whether the DMCA or electronic commerce may have an effect on it, such as to weaken its salutary purposes, and not whether the first sale doctrine applies.

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[3] All references to section numbers are to the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et. seq.*, unless otherwise specified.

Second, even though the first sale doctrine applies to digital copies and phonorecords by law, NARM and VSDA are concerned by the trend of some major copyright owners to use technological measures to circumvent the operation of the first sale doctrine, thereby preventing the operation of the first sale doctrine despite the law. Although technological measures may lawfully be used to prevent copyright infringement and to effectuate the licensing of copyrights, they should not be used to permanently control the lawful distribution and use of copies or phonorecords once the legal right to do so has been exhausted.

We shall begin in Part I with a brief introduction of the Congressional mandate which gave rise to this Request for Comment and which, we believe, does not support an inference that the first sale doctrine might not apply to digital media. In Part II we will outline the foundations of copyright law applicable here, including the development of the first sale doctrine under common law and its codification in Section 109 of the Copyright Act, and demonstrate that Congress clearly intended for Section 109 to apply to digital media. In Part III we will discuss in greater detail, and from the practical experience of NARM and VSDA, how the first sale doctrine is being eroded by the restrictive use of electronic commerce technology to circumvent its effect, how such erosion will negatively impact consumers, frustrate the objectives of copyright law, result in the de facto creation of a new exclusive and unrestricted general copyright "right of use," restrict freedom of speech, and extend the copyright monopoly far beyond the lawful limits of the Copyright Act. Using this background, in Part IV we shall respond to the specific questions raised in the Request for Comment.

I. CONGRESSIONAL MANDATE FOR THIS INQUIRY

Section 104 of the Digital Millennium Copyright Act ("DMCA"), enacted on October 28, 1998, directs the Register of Copyrights and the Assistant Secretary of Communications and Information of the Department of Commerce to submit to Congress, by October 28, 2000, a report evaluating the effects of Title 1 of the DMCA (prohibiting the circumvention of access control technologies) on Section 109 of the Copyright Act (the codification of the "first sale doctrine"). Specifically, the evaluation shall consider:

> (1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 [the first sale doctrine] and 117 of title 17, United States Code; and
>
> (2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

The Copyright Office and NTIA have requested that interested parties comment on such effects so that their views can be considered in preparing the report to Congress. The most troubling aspect of the Request for Comment is that it appears to be premised on the notion that the first sale doctrine does not apply to digital downloads (or perhaps even to compact discs ("CDs") or digital versatile discs ("DVDs"), even though Congress clearly believes that it does.[4] Of the specific questions asked in the Request for Comment with respect to the first sale doctrine, the most troubling is the last one, which reads (emphasis added):

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[4] In 1990, Congress excepted the rental of certain computer programs from the first sale doctrine rights in Section 109 while preserving the rest, including the right to continue renting video

> (h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

The basis for this apparent presumption of the "absence of a digital first sale doctrine" is not at all evident, since nothing in current law suggests that the first sale doctrine ceases to apply where the copy or phonorecord of a work happens to be in digital form. In the following two sections we shall describe why such a position is contrary to case law and the constitutional underpinnings of copyright law, and why it is contrary to the plain language and legislative history of the Copyright Act. There can be no doubt that the first sale doctrine applies to all digital media regardless of the tangible medium in which it is embodied.

Perhaps what the Request for Comment intended by "absence of a digital first sale doctrine" was not to suggest that the DMCA has abrogated the first sale doctrine, but that the new technology has enabled copyright owners, contrary to the intent of the Copyright Act, to effectively nullify the legal effects of the first sale doctrine through a technological extension of control over distribution despite the fact that the distribution right in Section 106(3) has been exhausted by law. We shall also discuss the need for legal tools to prevent such technology-based copyright misuse.

II. LEGAL FOUNDATIONS OF COPYRIGHT LAW

At common law, authors enjoyed a limited copyright, which consisted of the "right of first publication." *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N.Y. 241, 254 (1898).

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games. Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, Title VIII, § 802, Dec. 1, 1990, 104 Stat. 5134. This demonstrates Congress' belief that the first sale doctrine applies to digital media, since computer programs are, by their very nature, works in digital form.

That common law copyright disappeared upon publication, *id.*, and also upon securing statutory copyright protection. *See id.* at 247 (stating that "No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right."). Under the common law copyright, the author could only protect the copyright by non-publication or by relying upon contractual restraints in hopes of preventing the effects of publication for, once published, the copyright owner's "property right in it is gone and every one may make use of it." *Id.* Obviously, such result created a substantial disincentive to publish or disseminate, to the detriment of the public's interest in science and the arts, and the Constitution authorizes Congress to remove it.

The Constitution provides that Congress' authority to enact copyright laws is "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (U.S. CONST., art. I, cl. 8). The obvious intent was to overcome the common law copyright's disincentives, and to encourage authors to create and to disseminate their works. To obtain the benefits of the new statutory protections, authors had to give up restraints upon the distribution of authorized copies of their works, for the objective was not to give the force of federal statutory law to the common law copyright, but to encourage authors to give up the common law's privilege of restricting distribution in exchange for protection against unauthorized duplication or performance of those copies without the burden of having to create and enforce millions of separate contracts (known today as "end user license agreements" ("EULA")). Nevertheless, the framers of the Constitution were careful to limit the scope of Congress's authority to enact such copyright protections so that works would be widely disseminated — to grant the monopoly for only the "limited time" reasonably necessary to maintain an incentive for authors to create and publish.

The Constitution's specific limitations on Congressional authority in this regard, and its ultimate purpose, have been repeatedly emphasized by the United States Supreme Court. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994), the Supreme Court summarized some of these principles as follows:

> We have often recognized the monopoly privileges that Congress has authorized, while "intended to motivate the creative activity of authors and inventors by the provision of a special reward," are limited in nature and must ultimately serve the public good. *Sony Corp. of Am. v. Universal City Studios,* Inc., 464 U.S. 417, 429 (1984). For example, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), we discussed the policies underlying the 1909 Copyright Act as follows:
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>> "The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." (Footnotes omitted.)
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> We reiterated this theme in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991), where we said:
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>> "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." (Citations omitted.)
>
> Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.

Indeed, so strong is the public interest in preventing the overexertion of copyright claims that the Supreme Court concluded in *Fogerty* that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them" because "a successful defense of a 8 copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright." *Id.* at 527.

Thus, as we explained more fully below, there can be no doubt that the first sale doctrine and its codification in Section 109 further the policies of the Copyright Act. As Congress intended, the first sale doctrine continues to apply to works in digital form – and any other form now known or later developer – to the same extent that such works are protected by copyright.

A. The First Sale Doctrine and Section 109 of the Copyright Act

The Copyright Act, as amended, furthers the Constitution's purposes by giving copyright owners only a limited monopoly for a limited time. Significantly, the Copyright Act specifically extinguishes the copyright owner's right to control distribution of a copy or phonorecord lawfully made under the Act once the copyright owner has transferred title to another (the so-called "first sale" doctrine).[5] Section 109. Thus, as discussed more fully in Part III, if an access control technology were used to prevent the exhaustion, by law, of the distribution right (such as by requiring library patrons to register, pay a fee, or divulge personal information before being granted access to a copy or phonorecord borrowed from the library, or by requiring a similar procedure to enable a friend to access a copy or phonorecord transferred by gift) then the access control technology would become a tool for circumventing the rule of law rather than protecting any right granted by law.

The existing first sale doctrine as codified in Section 109 applies to "copies or phonorecords," which, by definition, include digital copies or phonorecords without regard to where or how they were made. It complies with full force and effect to all media – including digital media – now known or later developed.

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[5] In the case of sound recordings and computer programs, the exhaustion of the distribution right is not total, as it permits the copyright owner to control whether the owner may rent a copy or phonorecord of a sound recording or of a certain class of computer programs. Section 109(b).

1. Common Law Basis of Judicially Created First Sale Doctrine

This nation has a long history of opposition to restraints on alienation of property. Prior to the enactment of the Copyright Act of 1909, the courts had already concluded that the right to vend – the distribution right – was exhausted once exercised. Even then, the focus was not on whether a "sale" had been made, but whether someone other than the copyright owner had been vested with ownership, for one of "the ordinary incidents of ownership in personal property" is "the right of alienation" of that property, which is "attached to" the ownership. *Harrison v. Maynard*, 61 F. 689, 691 (2d Cir. 1894).

2. Codification of First Sale Doctrine

Congress first codified the first sale doctrine in Section 27 of the Copyright Act of 1909. At the time, the House Committee on Patents stated that this codification was "not intended to change in any way the existing law, but simply to recognize the distinction, long established, between the material object and the right to produce copies thereof." H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909).[6] The Report went on to note: "Your committee feel [sic] that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." *Id.* (emphasis added).

With the Copyright Act of 1976, Congress continued this line of reasoning, and went further, making clear that it intended to prevent some of the questions being raised in this Request for Comment from ever becoming an issue. Early in the last century, the Supreme Court had wrestled with the question of whether musical compositions copied onto the new technology medium of the time – player piano rolls – constituted copies of the sheet music that contained the same composition. Concluding that a "copy" had to physically look like the original, the Supreme Court concluded that player piano rolls were not copies of the sheet music. *See White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). With the Copyright Act of 1976, at a time when sound recordings on audio cassette and 8-track tape were already in widespread circulation, Congress was unequivocal in its determination that the law need not specify each and every tangible medium of expression, adding that such medium may be any medium "now known or later developed," and overturning *White-Smith*. The House Judiciary Committee explanation at the time was as follows:

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[6] Quoted in *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 852 (1963).

> As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be - whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 52 (1976). What Congress wanted to do in 1976 was to make certain that the *White-Smith* mistake would not be repeated.

3. The Digital Millennium Copyright Act ("DMCA")

To comply with the demands of Article 18 of the WIPO Performances and Phonograms Treaty, Congress enacted certain provisions of the DMCA to prohibit the circumvention of "a technological measure that effectively controls access to a work protected under [the Copyright Act]." Section 1201(a)(1)(A).[7] The DMCA did not, however, alter Section 109 or the first sale doctrine in any way. Rather, in Section 104 of the DMCA, Congress simply expressed its concern over the effects that digital technology and the DMCA might have on the operation of Section 109 as a practical matter – not as a legal one.

4. *No "Sale" Is Required.*

Moreover, the Copyright Act also makes clear that the first sale doctrine need not involve sale of the tangible medium. Rather, as indicated in Section 109 itself, the pivotal question is whether the person asserting the first sale doctrine right is the "owner" of a lawfully "made" copy or phonorecord. There is no requirement that the tangible medium of expression has been sold by the copyright owner, but only that the owner of the lawfully made copy or phonorecord be the lawful owner. Thus, a copy discarded by the copyright owner, or acquired by gift or breach of contract by the seller, entitled the owner to the full rights of the first sale doctrine. *See* Part IV(e)(B) below, and nn. 18-21.)

Thus, the "first sale" doctrine is a misnomer, owing its inaccuracy to its common law heritage, having derived from our longstanding public policy disfavoring restrictions on the alienability of property after it has been sold. As currently codified with respect to copyright in Section 109, the first sale doctrine is not dependent upon a sale, but only upon "ownership" of a "copy or phonorecord" that was lawfully made under the Copyright Act.

> Notwithstanding the provisions of [the distribution right in] section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person

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[7] It also prohibited the falsification, alteration or removal of copyright management information. Section 1202.

> authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . ."

Section 109(a).

5. *Copies may be lawfully made at a retail store or home.*

The first sale doctrine also applies to exhaust the copyright owner's distribution right when a copy is lawfully made by anyone, including a retailer or an individual. Copies can be mass produced at a factory or singularly by the consumer. The owner of a lawfully made copy or phonorecord is the owner regardless whether the copy was purchased or, after the purchase of a blank medium, lawfully "made" by exercising a license to make a copy.

> [The law] does not forbid an individual from selling, or otherwise transferring, a copy of a copyrighted work which was lawfully obtained or lawfully manufactured by that individual. If the copyright owner has given up title to a copy of a work, the owner no longer has exclusive rights with respect to that copy.

United States v. Sachs, 801 F.2d 839, 842 (6th Cir. 1986) (emphasis added). *See also United States v. Cohen*, 946 F.2d 430, 434 (6th Cir. 1991) ("This [first sale] doctrine recognizes that copyright law does not forbid an individual from renting or selling a copy of a copyrighted work which was lawfully obtained or lawfully manufactured by that individual"); M. NIMMER AND D. NIMMER, NIMMER on Copyright § 8.12[B][3][c]. Clearly, the owner of a copy made by an authorized digital download is vested with full first sale doctrine rights.

The Copyright Act is consistent with this judicial interpretation with respect to its treatment of the term "fixed" also. The definition of "fixed" includes the following explanation: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." Section 101. The House Judiciary Committee explained that this sentence "makes clear that, in the case of 'a work consisting of sounds, images, or both, that are being transmitted,' the work is regarded as 'fixed' if a fixation is being made at the same time as the transmission." H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 53 (1976). *Cf. id.*, discussing Section 115 (compulsory license for phonorecords), explaining that "[t]he term 'made' is intended to be broader than 'manufactured,' and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords." With such broad language, there can be no doubt that the compulsory license would apply to phonorecords "made" through digital downloads against the wishes of the copyright owner. It, therefore, stands to reason that the same rule would certainly apply in the case of phonorecords made by digital downloads authorized by the copyright owner.

Conceptually, and given the current state of digital technology, there is no distinction under copyright law between a CD made by the copyright owner and then sold by the copyright owner, a CD made by the copyright owner's agent (perhaps by digitally transmitting the sound recording to the manufacturing plant) and then sold by or with the authority of the copyright owner, a CD made by a record club under license from the copyright owner and then sold by the record club, a CD made in a retail store on demand from the consumer (again, with digitally distributed content) and then sold by the retailer, or a CD made on an individual's home computer's CD-RW drive (also using the same digitally distributed content). Assuming, of course, that in each case the copyright owner had authorized the making of the copy, the resulting CD (phonorecord) in each case would be "lawfully made" under the Copyright Act, and entitle the owner of the CD to all rights associated with Section 109.[8]

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[8] One record company actually authorizes individuals to make three copies: "You may install [*i.e.* "copy"] the Digital Recording on a hard disk for the purposes of (i) playback on the same PC or (ii) recording to a Compact Disc no more than two (2) times."

To take a forceful example, a person who owns a computer hard drive with hundreds of sound recordings or movies "lawfully made" through digital downloads is free to sell that hard drive without the consent of the copyright owner. All the more so, a person who lawfully makes a CD recording (or, in the future, a DVD recording) at a retail location or at home through a digital download is authorized, under Section 109, to sell it to the highest bidder, loan it, trade it or give it away, and the copyright owner is not authorized – under the Copyright Act – to prevent it. NARM and VSDA members would, also, be free to rent them for profit, just as is the practice today with audiovisual works recorded on videocassettes and DVDs.[9]

Indeed, not only does the first sale doctrine give the lawful owner of a lawfully made copy the "right" to further distribution without interference by the copyright owner, Section 109 imposes a prohibition upon the copyright owner against such interference. *Brode v. Tax Mgmt., Inc.*, No. 88 C 10698, 1990 U.S. Dist. LEXIS 998, at *12 (E.D. Ill. Jan. 31, 1990) (the sellers of a lawfully made copy "had no duty [at the request of the copyright owner] to require the subscribers to pull the portfolios from their shelves and indeed were prohibited from such action by section 109(a) and (b)").

III. COPYRIGHTS ARE LIMITED – NO EXCLUSIVE "USE" RIGHT

In this part, we will draw attention to four areas of concern where the copyright monopoly, coupled with modern technology enable copyright owners to control the use of copies of their works beyond the scope of their exclusive rights under Section 106; the use of licensing schemes and technological measures to circumvent the operation of the first sale doctrine; the use of technological measures to restrain competition at the retail level of distribution; and the use of technological measures enforced by the courts to restrain First Amendment rights.

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[9] NARM and VSDA members rent motion pictures on videocassette and DVD, and also rent video games for dedicated entertainment systems. Our members do not rent sound recordings, however, because Congress realized that there was virtually no legitimate rental market for sound recordings once cassette tape recorders were popularized. With NARM's support, Congress prohibited the rental of sound recordings without consent of the owner.

A. Technological Control Over Uses Beyond Reach of Section 106

The rights protected by copyright are limited to those six rights specified in Section 106. Although the only right directly implicated by Section 109 is the distribution right, it should be noted, at the outset, that there is no general copyright in the "use" of a lawfully made copy or phonorecord as against its lawful owner. Rather, once Section 109 applies to exhaust the distribution right, the only "use" rights granted by copyright that survive are those specific uses set forth in Section 106 – depending upon the type of work, the right to reproduce it, prepare derivative works from it, perform it publicly (and, in the case of sound recordings, by means of a digital audio transmission), and display it.[10]

Congress "has never accorded the copyright owner complete control over all possible uses of his work," but has instead limited the holder to the enumerated statutory rights in Section 106. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). The purpose of Congress in creating specific and limited rights under Section 106 of the Copyright Act was in furtherance of the Constitution's objectives. To use that monopoly power, however limited, for the purpose of gaining control over distribution of a work after the distribution right has been terminated by law is an abuse of that copyright. "A copyright owner may not enforce its copyright to . . . use it in any manner violative of the public policy embodied in the grant of a copyright." *Tricom, Inc. v. Electronic Data Systems Corp.*, 902 F. Supp. 741 (E.D. Mich. 1995) (citations omitted).

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[10] In addition, the author of visual art is granted certain "moral rights" not implicated here by virtue of Section 106A.

Even the new World Intellectual Property Organization ("WIPO") copyright treaties, which the DMCA intended to implement, lend no support for such a use right. The United States is a signatory of two WIPO (World Intellectual Property Organization) treaties that have a direct bearing on the issue of how copyright misuse should limit any rule prohibiting circumvention of access control technologies. First, the WIPO Performances and Phonograms Treaty of December 20, 1996, Article 18, requires parties to provide:

> adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

(Emphasis added.) It is noteworthy that Article 18 only requires adequate legal protection where the technological measures are used "in connection with the exercise of their rights under this Treaty" and used to restrict acts not authorized by the performers or producers of phonograms "or permitted by law." That is, Article 18 does not require that the United States provide legal protection against circumvention of technological measures used to restrict acts permitted by law.

Second, the WIPO Copyright Treaty of December 20, 1996, Article 12, creates certain obligations concerning rights management information (that is, "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public" (emphasis added)). There certainly can be no doubt that the current access control technologies that incorporate "digital rights management" systems containing "rules" governing use of a work constitute a form of "rights management information." However, the agreed statement of the Diplomatic Conference that adopted the treaty states, with reference to Article 12, that "Contracting Parties will not rely on this Article [12] to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty." Thus, to the degree that the U.S. Copyright Act is interpreted as restricting a copy or phonorecord owner's right of alienation of property in the name of technologically requiring adherence to private usage rules – rules imposed in derogation of the first sale doctrine – such interpretation would run afoul of Article 12. Moreover, such interpretation would upset the careful balance of competing social policies which underlay the Copyright Act.

> Civil copyright law is a compromise between competing social policies – one favoring the widest possible dissemination of new ideas and new forms of expression, and the other giving writers and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts. The first policy predominates, which means that the system of rewards is to be no more extensive than is necessary in the long run to elicit a socially optional amount of creative activity.

United States v. Bily, 406 F. Supp. 726, 730 (E.D. Pa. 1975) (footnote omitted). To preserve that balance, Congress made certain that the creation of copyright monopolies would not vest absolute control in the copyright owner. Section 109 is one of the most important of such limitations.[11]

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[11] "One of the most important limitations on copyright owners' exclusive rights is embodied in section 109 of title 17, United States Code." H.R. REP. NO. 735, 101st Cong., 2d Sess. (1990) (Statement of Legislative History, Title I, pagination unavailable).

B. Use of Licenses and Technological Controls To Circumvent The First Sale Doctrine

Because Congress saw fit to exhaust the copyright owner's right to restrict the distribution of a lawfully made copy or phonorecord once it is owned by another, any use of access control technology to circumvent the will of Congress and effectively "revive" a right that the law extinguished must be considered copyright misuse. In the same vein, if a technological control measure effectively renders a sound recording or motion picture unplayable if the owner of the copy or phonorecord transfers title to another, such measure frustrates the Congressional will and technologically prohibits a transfer that the copyright owner has no lawful right to prohibit.

The objective of copyright law is to promote the progress of science and useful arts, and any benefit to be derived by copyright owners is for that purpose. "The sole interest of the United States and the primary object of conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (quoted with approval in *Paramount Pictures*, 334 U.S. 131, 158 (1948). The copyright reward is intended to induce authors to release to the public the products of their creative genius. *Paramount Pictures,* 334 U.S. at 158.

It is not uncommon for intellectual property, including copyrights, to be licensed. Care should be taken, however, to distinguish between the lawful licensing of a copyright, on the one hand, and the purported licensing of "rights" not recognized by copyright, on the other, particularly where the latter are tied to the former or intended to circumvent the first sale doctrine. For example, a copyright owner may lawfully license someone else to make copies or phonorecords of a copyrighted work, because the copyright owner has the exclusive right to copy. The copyright owner may also set the sales price for copies or phonorecords it owns. But the right to set the sales price is one belonging to the owner of the copy or phonorecord, and not to the copyright owner as such. That is, the right to set the price is not a copyright and, therefore, the copyright owner has no right under the Copyright Act to enforce sales price terms in a license to make copies. "The Supreme Court held that any transfer of title is a first sale, and no copyright remedy is permissible to enforce the breach of contract involved." *United States v. Atherton*, 561 F.2d 747, 751 (9th Cir. 1977) (citing *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), (holding that copyright law could not be used to enjoin the sale of lawful copies below the cost set by the copyright owner).

Some copyright owners have become even more creative, and have purported to license the making and use of a copy or phonorecord under terms of an "end user license agreement" ("EULA") or similar artifice intended to control the use of a copy or phonorecord. For example, the "click-wrap" agreement offered by one record company in connection with a license to make several lawful phonorecords from one single digital download purports to control their use as follows:

> By purchasing and downloading this digital recording, you agree that (a) the digital recording is for your personal non-commercial use, (b) you will comply with and will not circumvent the Usage Rules or any technology designed to enforce the Usage Rules, and (c) you will not tamper with or modify the digital recording.
>
> Usage Rules: You may install the Digital Recording on a hard disk for the purposes of (i) playback on the same PC or (ii) recording to a Compact Disc no more than two (2) times; and (iii) exporting to a trusted (secure) or insecure portable player device no more than three (3) times. Any use of the digital recording other than as permitted above is a violation of this agreement and the United States Copyright Laws and is prohibited.

The example above combines legitimate terms that pertain to the licensing of copyrights (e.g., copying the sound recording onto a hard disk and onto two CDs – copies to which the first sale doctrine would apply) as well as restrictions upon the Section 109 rights (e.g. limiting the use of the hard disk copy to playback "on the same PC," thereby purporting to prohibit the sale of the hard drive separate from the PC, and prohibiting any use "other than as permitted above," which, if taken literally, would prohibit any use of the two lawfully made CDs, other than making them). Of course, the threat that failure to abide by these arbitrary usage terms is "a violation of . . . the United States Copyright Laws and is prohibited" is completely false as discussed above.

Another record company combines "free" computer software programs with CDs containing sound recordings. It then attempts to control the use of the entire CD through a license agreement pertaining to the "free" software, notwithstanding the fact that the retailer and consumer have each purchased it and are (or were) the lawful owners. The free software license agreement included with"The Writing's On the Wall," a CD album by Destiny's Child, is only viewable when the CD is used in a computer, and it reads, in part, as follows:

> SONY MUSIC ENTERTAINMENT INC. LICENSE AGREEMENT
> This legal agreement between you as end user and Sony Music Entertainment Inc. concerns this product, hereafter referred to as Software. By using and installing this disc, you agree to be bound by the terms of this agreement. If you do not agree with this licensing agreement, please return the CD in its original packaging with register receipt within 7 days from time of purchase to: Sony Music Entertainment Inc., Radio City Station, P.O. Box 844, New York, NY 10101-0844, for a full refund.
>
> 1. LICENSE; COPYRIGHT; RESTRICTIONS. You may install and use your copy of the Software on a single computer. You may not network the Software or otherwise use or install it on more than one computer or terminal at the same time. The Software (including any images, text, photographs, animations, video, audio, and music) is owned by Sony Music Entertainment Inc. or its suppliers and is protected by United States copyright laws and its international treaty provisions. You may not rent, distribute, transfer or lease the Software. You may not reverse engineer, disassemble, decompile or translate the Software.

Under Section 109, the lawful owner of the Destiny's Child CD is entitled to sell or give away the CD without Sony's consent. Under the terms of the license agreement, the owner is not even entitled to keep it if it does not agree to be bound by the terms of the free software license.

Such efforts to control the use of lawfully made phonorecords by the lawful owner may seem rather novel or "cutting edge" in the sound recording business, but Congress observed this failed tactic over twenty years ago when it was tried by the computer software industry in attempting to prevent the rental of computer software. In connection with the sale of digital computer programs, one copyright owner used "box top" licenses stating that the consumer was not purchasing the software itself, but only a license to use the program. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 96 (3d Cir. 1991). The court explained the practice in light of the Computer Software Rental Amendments Act of 1990, Pub. L. 101-650, 104 Stat. 5134, tit. I (amending Section 109(b) to except the rental of a certain class of computer software from the first sale doctrine):

> When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine. Under the first sale doctrine, once the copyright holder has sold a copy of the copyrighted work, the owner of the copy could "sell or otherwise dispose of the possession of that copy" without the copyright holder's consent. . . . Because of the ease of copying software, software producers were justifiably concerned that companies would spring up that would purchase copies of various programs and then lease those to consumers. . . . Consumers, instead of purchasing their own copy of the program, would simply rent a copy of the program, and duplicate it. This copying by the individual consumers would presumably infringe the copyright, but usually it would be far too expensive for the copyright holder to identify and sue each individual copier. Thus, software producers wanted to sue the companies that were renting the copies of the program to individual consumers, rather than the individual consumers. The first sale doctrine, though, stood as a substantial barrier to successful suit against these software rental companies, even under a theory of contributory infringement. By characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale, and by making the license personal and non-transferable, software producers hoped to avoid the reach of the first sale doctrine and to establish a basis in state contract law for suing the software rental companies

> directly. Questions remained, however, as to whether the use of state contract law to avoid the first sale doctrine would be preempted either by the federal copyright statute (statutory preemption) or by the exclusive constitutional grant of authority over copyright issues to the federal government (constitutional preemption). Congress recognized the problem, and, in 1990, amended the first sale doctrine as it applies to computer programs and phonorecords.

Id., n.7 (emphasis added, citations omitted). In the case of computer software rentals, the case was clear that the only reason for renting the computer programs was to make copies. Even then, the only real solution was a legislative one and, even then, the first sale doctrine was preserved for digital computer programs in its entirety, save for the owner's right to rent a limited class of computer programs (excluding, for example, video game cartridges) without the copyright owner's consent. Section 109(b). *See also, Sebastian Intern. v. Longs Drug Stores Corp.*, 53 F.3d 1073, 1075 (9th Cir. 1995) (rejecting use of a collective trademark to control the downstream distribution of products exclusively through authorized dealers). "We reject Sebastian's attempt to circumvent the 'first sale' rule." *Id.* As discussed above, *supra* at Part II(A)(5), even where the copies or phonorecords are not sold by the copyright owner but, instead, are created by the retailer or consumer licensed to make the copy, the first sale doctrine applies. Any other outcome would leave the retailer or consumer in the unenviable position of having received a license to make a copy but being unable to sell or otherwise dispose of it. "This would make little sense." *Bourne v. Walt Disney Co.*, 68 F.3d 621, 632 n.4 (2d Cir. 1995) (referring to a similar situation).

C. Use Of Technological Measures To Restrain Competition At the Retail Level Of Competition

For the first time in history, copyright owners have the power to control mass distribution of their works (at least those in digital form) from the point of manufacture all the way to the end consumer and beyond. They are now able to distribute copies or phonorecords to millions of people in a matter of a few minutes, simultaneously distributing at the wholesale and the retail level. Moreover, they can use technology to enforce absolute uniformity in the terms and conditions of sale available to all retail consumers, ignoring or supplanting efforts by retailers to offer more competitive pricing, policies and other competitive terms and conditions of sale, such as in the protection of consumer privacy and anonymity.

Ironically, the copyright owner's inability to effectuate such a total system of control over copies of copyrighted works is what prompted lawmakers to establish copyright protections in the first instance, harking back to the Statute of Anne in 1710. Thus, the owners of copyrights in digital works today are able to exercise total control over who can own or even access a copy or phonorecord, when, where, at what price, for how long, and whether the owner will have any meaningful right of alienation of property, and yet still claim the protections of the very same federal civil and criminal copyright law created precisely because they lacked any meaningful controls over their works.

Several authorities have already raised concerns over the current use of so-called "digital rights management" to enable copyright owners to, in effect, have their cake and eat it too. *See, e.g.*, Lawrence Lessig, *Code and Other Laws of Cyberspace*, 122-41 (1999). Of more immediate concern to the members of NARM and VSDA is the rapid erosion of the ability of retailers and distributors to competitively distinguish themselves in any meaningful way. For example, business models have already been unveiled which would force every retailer wishing to offer digital distribution to their customers to have to offer the copy or phonorecord at exactly the same price, under exactly the same terms, requiring exactly the same personal information, and subject to exactly the same privacy policies or lack thereof. Under this model, retailers serve merely as agents to funnel their customers to the copyright owners, who then establish the uniform prices, policies and terms.

NARM and VSDA members generally do not fear direct retail competition from their suppliers, because they generally feel they are capable marketers and retailers, plus they have the added advantage of being able to aggregate copies and phonorecords from all of the major entertainment companies and myriad of independents at a single shopping location. However, when the copyright owner can remove every significant competitive distinction offered by competing retailers, the benefits of competition for the consumer are lost. Indeed, some copyright owners are refusing to allow retailers to retain a significant advantage of the aggregator – the ability to sell downloads from all sources using a single electronic "shopping cart." These copyright owners would prefer that the terms, conditions, look and feel, and even customer service that any retailer can offer in a distinctive way will never be available for all products offered by that retailer, for the copyright owner will demand adherence to its own special terms regardless of the wishes of retailers and their customers.

These concerns within the retail community are very real. They are based upon current practices and trends. Similar concerns occupied the mind of Congress in the pre-digital era upon consideration of the Copyright Act of 1909:

> In enacting a copyright law Congress must consider, as has been already stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.
>
> It was at first thought by the committee that the copyright proprietors of musical compositions should be given the exclusive right to do what they pleased

> with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-music trust. It became evident that there would be serious danger that if the grant of right was made too broad, the progress of science and useful arts would not be promoted, but rather hindered, and that powerful and dangerous monopolies might be fostered which would be prejudicial to the public interests. This danger lies in the possibility that some one company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing the selling music producing machines, otherwise free to the world.
>
> The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use make of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

H.R. REP. NO. 2222, 60th Cong., 2d Sess. At 7 (1909). Over fifty years later, the Register of Copyrights was not yet faced with the competitive issues raised by absolute control over digital distribution, but nevertheless recognized similar dangers.

> Copyright has sometimes been said to be a monopoly. This is true in the sense that the copyright owner is given exclusive control over the market for his work. And if his control were unlimited, it could become an undue restraint on the dissemination of the work.
>
> On the other hand, any one work will ordinarily be competing in the market with many others. And copyright, by preventing mere duplication, tends to encourage the independent creation of competitive works. The real danger of monopoly might arise when many works of the same kind are pooled and controlled together.

Register's Report on the General Revision of the U.S. Copyright Law, at 5 (1961).

Today, in both the music and the motion picture industries, we are faced with a market in which many works of the same kind are pooled and controlled together by a few companies that dominate the industry. The first sale doctrine has been an invaluable tool in ensuring that consumers would continue to enjoy many options for purchasing, renting or otherwise enjoying copies and phonorecords on competitive terms, at least at the retail level. The use of technology to effectively lock out all options save those endorsed by a few powerful copyright owners demands legislative, regulatory and judicial attention to protect retail competition and consumer choice.

D. Principles Affecting Operation Of The First Sale Doctrine With Respect To Works Protected By the First Amendment

Although most copyrighted works may also be entitled to First Amendment protection in their enjoyment, the First Amendment right attaches without regard to whether the work is copyrightable, and protects copies and phonorecords regardless of whether the first sale doctrine applies. VSDA and NARM have long defended the rights of their respective members to sell, rent or display motion pictures, sound recordings and video games threatened by government censorship, and need not own any copyright in order to have standing to do so.

The First Amendment prohibits the government from restricting the distribution of copies or phonorecords, and practically mandates recognition of the first sale doctrine when the matter at issue is expressive material. A retailer's right to sell a CD is protected to the same extent as the artist's right to record it. But are private actors free to impose technological or licensing restraints on distribution without regard to the First Amendment? We believe that the answer is "no". While they may be free to impose the restriction by agreement, such agreement would be unenforceable. Once the first sale doctrine attaches to exhaust the distribution right, the owner of the copyright should not be permitted to obtain the aid of the government in abridging the freedom to disseminate lawfully made copies or phonorecords of constitutionally protected works.

At least one court seems to agree, noting that a copyright owner's effort to do so implicates First Amendment rights. *See United States v. Bily*, 406 F. Supp. at 735, n.15 (observing that First Amendment values were implicated in a criminal copyright infringement action involving the first sale doctrine).

Thus, where the copyrighted work has a significant expressive component, which is the case for books, music, motion pictures and even video games, the exhaustion of the distribution right is required by an even more fundamental principle – the principle that federal copyright law should not come to the aid of one who seeks to abridge the freedom of speech of another. The First Amendment demands that any person who is the lawful owner of a lawfully made copy be free to further distribute that work without restriction. To be sure, private parties may privately contract to limit one party's ability to speak, but neither Congress nor the courts should come to the aid of a copyright owner who seeks to impose restrictions upon the dissemination or use of a copy or phonorecord of a constitutionally protected work where such restriction would exceed the constitutionally - based, congressionally granted copyright.[12]

In sum, the Copyright Act grants no "use" right. The copyright owner has no right to tell the owner of a lawfully made copy of a book how many times it may be read, whether the corners of the pages may be turned down, whether passages may be underlined, or whether marginal notes may be made. By the same token, the copyright owner has no right under copyright to dictate any limit on how many times or for how many days a song may be listened to or a movie watched, or to limit the number of people to whom it may be lent or to whom it may be given. Because the use of such expressive materials is protected by the First Amendment, because the Copyright Act provides no such right over use, and because the Constitution limits the purposes for which Congress may provide copyright protection – which purposes would not be served by any general right over use by owners of copies or phonorecords – Congress should take care that measures ostensibly intended to protect against unauthorized copying not be used as a means of gaining, through technology, a de facto right to control the use of a work. Where private parties seek to expand the scope of their copyrights to control how owners of copies or phonorecords "use" their works, such efforts must fail under the First Amendment constraint against laws abridging the freedom of speech.

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[12] *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the action of state courts and judicial officers in enforcing a private agreement constituted "state action" for purposes of the Fourteenth Amendment and that, therefore, courts in equity would not enforce a private agreement to accomplish objectives prohibited by the Constitution even if the private agreement itself was not unlawful); *Barrows v. Jackson*, 346 U.S. 249 (1953) (refusing to allow action for damages for breach of lawful private agreement which would violate constitutional rights if the same terms were imposed by the government). *See, also,* Mark A. Lemley and Eugene Volokh, Freedom of Speech And Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (November 1998) (arguing for the application of First Amendment prior restraint principles in copyright actions).

IV. RESPONSES TO SPECIFIC QUESTIONS

> *(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?*

In the response to question (c), below, we explain some of the direct effects new technology has had on the operation of first sale doctrine. The effect of the prohibition on circumvention of technological protection measures is felt where the technological protection measure does more than just protect the copyright from infringement, but, in addition, furthers objectives unrelated to copyrights. Because those technological protection measures cannot be circumvented so as to limit their effect to only the lawful objectives, the effect is to strengthen the hand of the copyright owner at the expense of the owners of the copies and phonorecords. For example, a lawful objective of a copyright owner offering a digital download may be to insure that no matter through what channels the license (or sublicense) to make a copy is conveyed, the licensee will have to make some proof of payment before access to the work is granted, and even then, access to make unauthorized copies might be denied. If, however, those lawful objectives are achieved using means that require the licensee to disclose his or her identity to third parties, or to technologically bundle the desired product with other unwanted products, the owner of the lawfully made copy is unable to lawfully circumvent the technological protection measures for the sole purpose of protecting the owner's (or the owner's customers') privacy, or to unbundle the unwanted product and discard it.

For example, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the Supreme Court explained the limitations on copyright power in the context of "block booking" – "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." 334 U.S. at 156. The Supreme Court approved of the lower court's restriction against such practice as well as the lower court's reasoning, which was based not only on the illegality of the restraint itself, but also for reasons based squarely upon the Constitution and the Copyright Act.

> The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials.

Id. at 157 (quoting the lower court, citations omitted). The Supreme Court noted that, like patent law, the exclusive right granted under the Copyright Act does not include any privilege to "add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." *Id.* at 158. Here, Congress should be mindful to the limitation on using the copyright monopoly as leverage to enlarge the copyright owner's limited monopoly through use of technology which cannot lawfully be circumvented by the victim.

> *(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?*

Neither VSDA nor NARM are aware of any effect that the enactment of prohibitions on falsification, alteration or removal of copyright management information has had on the operation of the first sale doctrine. We note, however, that some state laws require the disclosure of the manufacturer of a copy or phonorecord (or "transferor" of the content).[13] Where a person lawfully manufactures a copy or phonorecord and wishes to exercise the Section 109 rights associated with ownership, the inclusion of that person's own name and address on the copy or phonorecord should not be construed to be a violation of this provision.

> *(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?*

Technology can now be used to circumvent constitutional and legislative limitations on the distribution right to the point of constituting copyright misuse and/or violation of antitrust laws. Already, NARM has been forced to file suit against a record company which is using digital technology to force retailers to include promotions of and hyperlinks to the record company's own competing Internet-based retail site with each CD sold. Such links are not included in CDs distributed in markets where the record company does not own the distribution right, and clearly have no function relating to the protection of the copyright. They only serve to promote the record company's direct sales to the retailers' customers. Such technology, currently used on CDs, is equally available for misuse in connection with digital downloads, where every time a retailer makes a sale, the retailer must share the customer with the copyright owner/competitor. Under such circumstances, Congress should consider creating a statutory license alternative to give competing merchants access to unadulterated works, subject of course to appropriate copy protection measures.

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[13] *See, e.g.*, Mass. Ann. Laws ch. 266, § 143C ("Whoever for commercial advantage or private financial gain knowingly manufactures, rents, sells, transports, or causes to be manufactured, rented, sold or transported, or possesses for purposes of sale, rental or transport, any recorded device the outside packaging of which does not clearly and conspicuously bear the true name and address of the transferor of the sounds or images contained thereon shall be punished as provided in section one hundred and forty-three D.").

> *(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?*

From the standpoint of the first sale doctrine, there is no relationship in that the first sale doctrine does not depend upon any particular technology used to make the copy or phonorecord. However, the new and emergent technology is increasingly being used to circumvent the effect of the first sale doctrine and to impose upon owners certain usage rules that are not among the Section 106 rights under the Copyright Act. Thus, it is copyright misuse by tying the copyright monopoly to the ability to extract compliance (either technologically or through forced "click-wrap" non-negotiable agreements) with conditions or terms to which the copyright owner is not entitled under copyright law.

> *(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?*

Nothing in the first sale doctrine itself, or Section 109 in particular, limits its application to particular media or methods of distribution.

A. The First Sale Doctrine Applies To All Media Including Digital Media

It is clear from the definition of the terms "copy" and "phonorecord" that both terms encompass digital media embodied in a tangible medium of expression:

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . .

Section 101 (emphasis added).

> "Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . .

Id. (emphasis added). Thus, existing law makes it crystal clear that a copy or phonorecord can be made out of any tangible object. The distribution right is exhausted with respect to copies or phonorecords, not only with respect to the listed material objects in the definitions of "sound recordings"[14] and "audiovisual works,"[15] but also flash memory cards, microchips, recordable (and home recorded) CDs or DVDs, and even computer hard drives. Of course, this does not mean that the owner of the material object can make copies without the copyright owner's consent. Rather, it means that if a copy or phonorecord was "lawfully made," the holder of the distribution right cannot lawfully prevent the owner of the material object from selling the material object, loaning it to a friend (or a library patron), or giving it away.

All that is required for the first sale doctrine and Section 109 to apply is that the media be tangible – that it be a "copy" or "phonorecord" as defined in Section 101. Congress intentionally made these definitions and the scope of the Copyright Act applicable to all media, even if not yet in existence. Section 101.

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[14] "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." Section 101 (emphasis added).

[15] "'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. *Id.* (emphasis added).

The intent of Congress is clear from the statutory language itself. Nevertheless, the House Judiciary Committee explained that this was precisely its intent, and that it also intended to legislatively overrule a court holding to the contrary. See H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 52 (quoted *supra* at 10).

Like Congress, state legislatures also saw the need to be forward-looking by insuring that their statutes would remain applicable to new technology without the need for continuous amendments. NARM and VSDA worked closely with the Recording Industry Association of America ("RIAA") and Motion Picture Association of America ("MPAA") during the early 1990s to persuade several state legislatures to update their "truth in labeling" laws applicable to audiovisual works and sound recordings to include compact discs and other media "now known or later developed."[16] Such laws were first developed when analog tape was the recording media of the day, and digital recordings on tape, CDs or other media were not even on the horizon. With the advent of digital media, however, these state legislatures that considered the applicability of their laws to the digital era realized that by inclusion of the qualifier "now known or later developed" it would be unnecessary to amend the laws with each new technological innovation because the principle was clear: The media was not to be confused with the message. The need for proper identification was a lasting principle applicable to existing media and to any other tangible medium of expression "now known or later developed." The more recent legislation in the few states enacting the Uniform

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[16] *See, e.g.*, Code of Ala. § 13A-8-80; Ariz. Rev. Stat. § 13-3705; Ark. Stat. Ann. § 5-37-510; D.C. Code §§ 22-3814 and 22-3814.1; Fla. Stat. § 540.11; K.S.A. § 21-3750; K.R.S. § 434.445; Mass. Ann. Laws ch. 266, § 143; Va. Code Ann. § 59.1-41.4.

Computer Information Transactions Act ("UCITA") – two years after enactment of the DMCA and with digital distribution in full swing – continues to use this forward-looking media agnostic formulation.[17]

B. The First Sale Doctrine Applies To All Owners Of Lawfully Made Copies Regardless of Distribution Method.

As for methods of distribution, all that is required for the first sale doctrine and Section 109 to apply is that the "owner" be a lawful owner of a lawfully made copy or phonorecord. As noted above, the first sale doctrine has never required that ownership be established through normal sale. Ownership may also be obtained through sale in breach of contractual restrictions,[18] gift,[19] manufacturing under license,[20] salvage or even waste paper.[21] The critical focus is on whether the person asserting the first sale doctrine right is the lawful owner of a lawfully made copy.[22] This analysis may involve a determination of whether there was a first sale by the copyright owner, but at bottom the question is whether the copyright owner exercised its distribution right -- its right to vend -- by placing that copy or phonorecord in commerce or otherwise giving up title to it.

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[17] *See, e.g.*, Va. Code Ann. § 59.1-503.7(f)(1) ("A grant of 'all possible rights and for all media' or 'all rights and for all media now known or later developed,' or a grant in similar terms, includes all rights then existing or later created by law and all uses, media, and methods of distribution or exhibition, whether then existing or developed in the future and whether or not anticipated at the time of the grant.").

[18] *See United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977).

[19] *See, e.g., Walt Disney Productions v. Basmajian*, 600 F. Supp. 439 (1984).

[20] *See, e.g., United States v. Sachs*, 801 F.2d at 842.

[21] *See, e.g., United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977).

[22]

> Given that unambiguous statutory formulation, it is questionable how much guidance is even needed from the legislative history . . . [and] on balance, it would seem that the literal text of Section 109(a) should be followed, so that immunity may be claimed by any "owner of a particular copy or phonorecord lawfully made," and not just by those who acquired such ownership via a prior transfer from the copyright owner.

Nimmer, § 8.12[B][3][c].

> *(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?*

At the outset, it warrants noting once again that the Copyright Act has been carefully crafted to apply to new technologies without modification. (See discussion at Part II(2), *supra.*, concerning the 1976 Act's inclusion of the phrase "now known or later developed" in reference to the definition of certain works and the tangible media of expression in which they are fixed, and the discussion in response to question (e), *supra* .) Thus, the first sale doctrine applies to "copies" and "phonorecords" which have been defined to encompass copies and phonorecords in any conceivable form, so long as they are embodied in a tangible medium.

On the other hand, in crafting a forward-looking Copyright Act, Congress appears not to have envisioned the situation facing us now, in which the very digital technology used to create new forms of copies and phonorecords is also used to circumvent the first sale doctrine, such that copyright owners are able to gain all of the protections of the Copyright Act without having to abide by the requisite constitutionally-based limitations imposed by law. Thus, while the premises of the first sale doctrine have not substantively been altered in any way by new technology, one fundamental premise of the first sale doctrine was that the law could be given its intended effect. That is, it was premised on the notion that the owner of a lawfully made copy or phonorecord would have certain rights as against the copyright owner with respect to the copies he or she owned, and that the law would be sufficient to protect those rights. Today, however, the law's ability to protect the Section

109 right is being threatened, as technology enables the copyright owner to effectively control the use and further distribution of a copy or phonorecord notwithstanding the copy or phonorecord owner's right to use or dispose of it freely. In effect, copyright owners are able to use new technologies to thumb their noses at the constitutionally-mandated restrictions on copyright. They can tell the owner of a copy or phonorecord: "Certainly you may loan your sound recording on CD to a friend, but your friend cannot listen to it without paying for my key to unlock it." "Certainly you may sell your movie on DVD, but the new owner will not be able to watch it without paying another fee." "Certainly you may rent it, but you will have to pay extra for me to turn off the limited play feature." In other words, today's technology can already be used to prevent the Section 109 rights from being used in any meaningful way.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

For the reasons discussed above, it is the contention of VSDA and NARM that the first sale doctrine need not be expanded to "apply" to digital transmissions because the first sale doctrine clearly already applies to the results of those transmissions. That is, the transmission itself, during the course of transmission, is not a "copy" or "phonorecord" because the work is not fixed in a tangible medium of expression, and therefore Section 109 does not apply. However, once the digital transmission is complete and the audiovisual work or sound recording is fixed in a tangible medium of expression (such as a computer hard drive, CD, DVD, or flash memory) Section 109 clearly applies. The owner of the tangible medium becomes the owner of a lawfully made copy or phonorecord, and may dispose of the copy or phonorecord without the copyright owner's consent. The owner "may use or dispose of that copy as he [or she] wishes, unrestricted by the copyright law."

Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881, 882 (E.D. Pa. 1964) (citations omitted).

Notwithstanding the above, NARM and VSDA do believe that the reach of the first sale doctrine should be "expanded" to insure its effectiveness and continued viability.

C. Doctrine of Copyright Misuse Should Be Applied Where Technology Is Used To Circumvent The Operation Of The First Sale Doctrine

There is an increasing trend on the part of the owners of large collections of copyrighted works to attempt to control the retailing operations by relying upon retailers to make the "sale" – to solicit the consumer and enter into a transaction authorizing the consumer to download (manufacture) a work – while preventing the retailer from controlling other communications or transmissions separate from the copyrighted work. For example, the copyright owner might allow the retailer to make the sale, but insist upon transmitting the content directly to the consumer and, in the process, solicit personally identifiable information from the consumer and perhaps impose so-called "click wrap" conditions upon the consumer.

For this reason, and the reasons noted in response to question (f), VSDA and NARM believe that the copyright misuse doctrine should be applied by the courts to keep in check those who would abuse the new access control technologies to extend the copyright beyond its term or to interfere with the Section 109 rights of owners of lawfully made copies of phonorecords. The Copyright Office should assign works to which such restrictive technologies have been applied to a class to which the Section 1201 prohibition on circumvention should not apply. Finally, there should be enacted an anti-circumvention measure to protect the first sale doctrine from being trampled by arbitrary technological means. For example, a new subsection to Section 1201 could be added, stating something along these lines:

> This section shall not apply to access control technologies which prevent access to copyrighted works beyond the term of the copyright, give the copyright owner greater rights than those granted in Section 106, or impair the rights of the owner of a copy or phonorecord lawfully made under this title as set forth in Section 109.

D. The First Sale Doctrine Should Be Expanded To Apply To Use of Technology To "Move" Digital Content From One Medium To Another

New technology has emerged to effectively mimic the intent of the first sale doctrine without requiring the transfer of ownership of the tangible medium itself. So-called "move" technology can be used to enable the owner of a copy or phonorecord to, in effect, "move" the copy without transferring ownership of the tangible medium – which could prove difficult or undesirable if the tangible medium happened to be a computer hard drive – but by actually making a copy using technology that effectively deletes or "locks out" access to the copy from which it is made. In other words, there may literally be two copies, but only the second copy can be accessed.

Use of "move" technology, a variation of which is sometimes referred to as a "check-in/check-out" process, could be very useful in increasing market efficiencies. For example, in a retailing environment, a retailer could purchase multiple "copies" for inventory, but the technology could allow all such "copies" to reside in one real copy, with technological controls to insure that only the number of copies paid for can be technologically "moved" to a different medium for transfer to the consumer. Each time a copy is so "moved," a counter associated with the retailer's virtual inventory of copies reduces the number of copies available for moving by a factor of one. The net effect is that the copyright owner will have been compensated for each copy that makes its way to the ultimate consumer, but intermediaries will save valuable storage space. *See, e.g., Lantern Press, Inc. v. American Publishers Co.*, 419 F. Supp. 1267 (1976) (use of chemicals to "lift" art work off of paper and move it onto resin film was protected by the first sale doctrine).

A similar result could be obtained by authorizing the retailer to license consumers to make copies, but recognition of "move" and "check-in/check-out" technology as the equivalent of transfer of the tangible medium would continue to preserve the consumer's right to alienation of property without forcing a transfer of the tangible medium. This would be particularly desirable where incompatible media render the physical transfer of ownership ineffective. The owner of a copy on a computer hard drive could, for example, "sell" the copy or phonorecord without transferring the hard drive but, instead, transfer the content to new media while at the same time disabling access to the hard drive copy. Such technology is already available and sometimes used to control "use" of a copy or phonorecord in ways that exceed the copyright owner's authority. The technology could just as well be used for the benefit of science and the useful arts by allowing greater transfer of copies for which the copyright owner has already been fully compensated.

> *(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?*

Again, VSDA and NARM vehemently deny the "absence of a digital first sale doctrine under present law" for the reasons discussed above. Assuming, *arguendo*, that the first sale doctrine does not apply to digital media we would be faced with the immediate prospects of copyright owners controlling forever what people do with and how (or whether) they can dispose of the motion pictures and sound recordings that they buy.

Curiously, this question inquires about "the marketplace for works in digital form" without explanation. If by this phrase is meant works recorded in digital form onto a tangible medium of expression, then there is certainly no "absence" of the first sale doctrine which, as discussed above, applies regardless of the medium used or the method (e.g. analog or digital) used. If the phrase intends to apply only to digital transmissions without copying onto a tangible medium, then the fact that the first sale doctrine does not apply where the work is not embodied in a tangible medium of expression – regardless whether analog or digital – means *a fortiori* that digital media would be treated the same as analog media and, just as the first sale doctrine does not apply to an analog radio or television broadcast of a song or audiovisual work, so, too, it does not apply to a digital broadcast (or digital "streaming" over the Internet) of a song or audiovisual work. Naturally, since neither analog or digital broadcasts can be "owned" (as there is nothing that can be owned), the absence of a first sale doctrine applicable to the broadcast or transmission itself – without any copying or recording onto a tangible medium of expression – would have no effect on such non-existent marketplace.

To put it another way, "works in digital form" have no marketplace save when they are embodied in a tangible medium of expression. Once they are so embodies, the owner of that copy or phonorecord may, under present law, sell or otherwise dispose of such copy without the authority of the copyright owner in accordance with the first sale doctrine and Section 109. The only remaining policy question is whether, and how, technological measures used to circumvent the first sale doctrine can be kept in check.

Respectfully submitted,

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August 4, 2000

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RE: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act
65 Fed. Reg. 35673 (June 5, 2000)

Dear Messrs. Feder and Joyner:

The Interactive Digital Software Association (IDSA) appreciates the opportunity to offer the following comments in response to the above-referenced Federal Register notice.

1. About the IDSA

Formed in April 1994, the IDSA is the only U.S. association exclusively dedicated to serving the business and public affairs interests of companies that publish video and computer games for video game consoles, personal computers, and the Internet. IDSA member companies collectively account for more than 90 percent of the $6.1 billion in entertainment software sold in the U.S. in 1999, and billions more in export sales of U.S.-made entertainment software. IDSA member companies depend upon strong copyright protection and enforcement for their works of authorship and conduct active enforcement campaigns against the worldwide scourge of entertainment software piracy. The IDSA was an active participant in the public policy debate that culminated in enactment of the Digital Millennium Copyright Act (DMCA) in 1998.

2. The Section 104 Study

Section 104 of the DMCA (codified as a note to 17 USC 109) calls for the Copyright Office and NTIA to carry out a joint evaluation and report on the impact of three kinds of legal and technological developments on the operation of two specified sections of the Copyright Act. The sections in question are sections 109 and 117 (17 U.S.C. 109 and 117). The developments to be taken into account in the evaluation and report include (1) the amendments made by Title I of the DMCA; (2) "the development of electronic commerce and associated technology"; and (3) "existing and emergent technology."

The IDSA's comments at this stage of the proceeding will focus primarily on the impact of existing and emergent technology on section 117 of the Copyright Act. Of course, we reserve the right to address additional areas covered by the Section 104 study in any reply comments we may choose to submit, and to seek to testify at any public hearings that may be held.

3. Section 117: Background

The basic provisions of Section 117 were added to the Copyright Act in 1980. They provide a limited exception to the exclusive right of reproduction of a computer program. The exception to allow so-called archival or back-up copying of a computer program, without the permission of the copyright owner, is set forth in section 117(a)(2), which provides in relevant part –

> "Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of a computer program provided ---
>
> . . .
>
> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

In enacting the new section 117, Congress hewed closely to the recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU), which had been created by the Copyright Act of 1976 and which reported to Congress on July 31, 1978.[1] The CONTU Report succinctly explained the purpose of section 117(a)(2) and how it fit with the other main provision of section 117 as recommended by CONTU:

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[1] The House Judiciary Committee report on the 1980 amendments noted that section 117 "embodies the recommendations of [CONTU] with respect to clarifying the law of copyright of computer software." H. Rpt. 96-1307, pt. I, at 23 (1980). Courts have generally treated the CONTU Report as an authoritative reflection of Congressional intent in enacting section 117. See, e.g., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1252 (3rd Cir. 1983); Midway Mfg. Co. v. Strohon, 564 F.Supp. 741, 750 (N.D. Ill. 1983).

"One who rightfully possesses a copy of a program, therefore, should be provided with a legal right to copy it to that extent which will permit its use by that possessor. This would include the right to load it into a computer and to prepare archival copies of it to guard against destruction or damage by mechanical or electrical failure." CONTU Final Report at 13, emphasis added.

It is clear that the intention of CONTU in proposing what became section 117(a)(2), and the intention of Congress in enacting it into law two years later, were greatly influenced by the state of computer technology at that time. In the late 1970's, the personal computer was in its infancy. Computer programs were embodied in media such as punched cards, open reel magnetic tape, and increasingly in the innovative magnetic disk format called a floppy disk. Computer memory capacities were miniscule by today's standards, and it would often be necessary to load a program onto the computer each time the program was intended to be used. Larger programs required many floppy disks for storage, making reloading a program a tedious and time-consuming task. Furthermore, computer systems themselves were much more vulnerable to malfunctions than they are today, and the accidental erasure of a program was a real danger, especially when the computer was being operated by an inexperienced user (and in many businesses and institutions, all users were inexperienced). Just as computer programs needed to be copied in order to be run in the first place (the situation addressed by section 117(a)(1)), so sound information technology practices called for the preparation of a back-up copy in case the original was damaged or destroyed. Hence the need for section 117(a)(2), which enabled the owner of a copy of a program to make an archival copy of his original without having to seek the permission of the copyright owner.

The technology-specific reasons underlying section 117(a)(2) also account for the narrow scope of the exception it creates. Section 117(b) provides that archival copies made pursuant to section 117(a)(2) may only be transferred along with the master copy, and "only as part of the lease, sale or other transfer of all rights in the program." Section 117(a)(2) itself requires that all archival copies be destroyed whenever "continued possession of the [original] computer program should cease to be rightful." Put another way, the existence of a secondary market in so-called "back-up copies," or in equipment or services purportedly intended to be used to make or to use such copies, is completely antithetical to the specific language of section 117(a)(2), and totally alien to the technological assumptions which underpinned its enactment.

4. Section 117: The Current Landscape

If we fast-forward twenty years, however, we encounter a much different reality, with three salient features. First, the technological environment within which section 117(a)(2) was originally enacted has largely disappeared. Second, the courts have generally respected the narrow scope of the provision. Despite these developments, however, section 117(a)(2) is being widely claimed as a shield for copyright piracy, as well as for violations of the new anti-circumvention provisions of the DMCA, especially in a medium for the dissemination of copyrighted material (in both legitimate and pirate versions) which the drafters of section 117(a)(2) could not have anticipated: the Internet.

a. Technological developments. Technological changes have made section 117(a)(2) largely unnecessary for the purposes for which it was originally enacted. Computer programs for the mass personal computer market (which barely existed in the late 1970's) are commonly distributed in formats such as CD-ROM which are themselves intended to serve as archival copies. The working copy, which is loaded onto the hard drive of the user's PC, does not need to be refreshed or re-created each time the user wishes to run the program. When it is necessary to re-install the program, the CD-ROM or similar copy which the user acquired in the first place remains conveniently available to him or her. Furthermore, while the type of "mechanical or electrical failure" which concerned CONTU in the late 1970's – or its 21st century equivalent, the system crash – still occurs, the user does not need to make an archival copy in order to be ready to recover from it; the originally acquired copy serves that purpose.

Of course, computer programs related to entertainment software are employed today on a wide variety of platforms other than the PC, notably on the console systems that currently support the lion's share of the videogame market, and increasingly over the Internet. In the former case, back-up copies are not needed both because the "mechanical or electrical failure" that would rob the user of access to the program he or she has acquired is a rare occurrence, and because the full program generally does not need to be loaded onto the platform in order to carry out the use intended. (To give a specific example, the Basic Input Output System (BIOS) for console platforms, unlike the operating system for a PC, never needs to be reloaded due to a system failure.) In the case of game playing over the Internet, the technology often does not require that the end-user ever come into possession of a complete copy of the computer program in order to play the game. Thus, since the section 117(a)(2) exception can only validly be exercised by (or at the direction of) the owner of a copy of a computer program, the essential factual predicate for its use is missing, and the exception may never apply at all.[2]

Legal precedents. By and large the courts have interpreted the boundaries of the section 117(a)(2) exception rather strictly. As one commentator has summarized the cases, "courts have generally construed this exemption narrowly and in light of the concern that occasioned its adoption – specifically, 'to guard against destruction or damage by mechanical or electrical failure.'" Goldstein, Copyright (2d ed. 2000) sec. 5.2.1 at page 5:35. Although at least one court has taken a somewhat broader view of the range of risks against which the making of an archival copy may legitimately provide protection,[3] none seems to have countenanced trafficking in so-called "archival copies" or in the tools for making them.

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[2] Of course, even a user who acquires lawful possession of a copy of a computer program may not be the owner of that copy. More and more commonly, the user acquires the copy by license, not sale, and accordingly is a licensee, not an owner. Regardless of how the status of the lawful possessor is characterized, our point is that technological developments and business models increasingly deliver the benefits of use of a computer program – including those embodied in entertainment software products -- to parties who never come into physical possession of a copy of it. These models have also gained currency outside the entertainment software sector.

The "back-up copy" epidemic. Despite the diminishing need for an archival copy exception to protect any legitimate interest of users of computer programs, and the lack of any judicial precedent for expanding the scope of section 117(a)(2), the World Wide Web is replete with sites purporting to offer "back-up copies" of videogames containing computer programs, or of the means for making them. Many of these sites specifically refer to section 117 as providing a legal basis for their operations. One site, for example, reassures users that "under the copyright laws of the U.S., you are entitled to own a backup of any software you have paid for,"[4] while another proclaims:

> "All the games, music cd's, and computer software that you will find on this page for sale are copied. It is perfectly legal by Section 117 of the US Copyright Law, to own these cd's and use them as long as you have the original program, game, or music cd. It is illegal though to own these backups if you do not own the original. I don't care whether you own the original or not, but I am not responsable [sic] for what you do with what I sell you."[5]

Of course, the operators of these sites are not offering copies of which they are the rightful owners, nor are they offering to distribute the "back-up copies" along with the originals in an all-rights transaction, as section 117(b) requires for any transfer of a copy made pursuant to section 117(a)(2). Nor do these sites restrict themselves to the distribution of copies of computer programs, which are the only kind of copyrighted work affected by section 117(a)(2); their inventory extends, for example, to audio-visual works embodied in videogames, to which the archival copying exception clearly has never applied. What these sites are offering, simply, is pirate copies of entertainment software and other products containing copyrighted computer programs. They refer to section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction – a download of pirate product -- might in fact somehow be lawful. They exploit the statute, in other words, not as a legitimate defense to infringement, but as an enticement to engage in piracy.[6]

Even more disturbingly, many web sites are making available tools and services for circumventing protective technologies employed by the owners of copyright in entertainment software products, in order to enable the playing of pirate or unauthorized copies of these games. Although trafficking in such tools is a clear violation of the new anti-circumvention provisions enacted in Title I of the DMCA, 17 USC 1201 et seq.,[7] the operators of these sites frequently tout the use of these tools to "play back-up copies," thus seeking to obscure their illegality. This is akin to the argument sometimes made, but uniformly rejected by the courts, that the provision of such tools enables back-up copying under section 117(a)(2), and thus qualifies as a "substantial non-infringing use" that rescues the operator from liability for contributory copyright infringement.[8]

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[3] See Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988).

[4] http://www.roms2000.com/disclaimer.htm (visited August 4, 2000)

[5] http://www.angelfire.com/on/cdrbackups/index.html (visited August 4, 2000).

[6] Pirates could also use their misrepresentations about section 117(a)(2) to complicate the task of criminal enforcement against their activities. Criminal copyright liability requires proof of "willfulness," 17 USC 506(a) and evidence that the operator of a pirate site subjectively believed that her activities fell within the scope of the archival copying exception would tend to undermine such a finding.

[7] See, e.g., Sony Computer Entertainment America Inc. v. Gamemasters, 87 F. Supp. 2d 976 (N.D. Cal. 1999); Nintendo of America Inc. v. Bung Enterprises Ltd., No. 97-8511-GAF (VAPx) (C.D. Cal. Nov. 8,

5. Recommendations for the Section 104 study

These developments make it clear that the impact of emergent and existing technology justifies narrowing the language of section 117(a)(2), such as by making it clear that the provision does not allow a free-standing market in so-called "back-up copies," and that it only covers the copying of computer programs to the extent required to prevent loss of use of the program when the original is damaged or destroyed due to electrical or mechanical failures. Such a statutory adjustment would not only accurately reflect the changes wrought by two decades of technological advancement, but would also promote legitimate electronic commerce. Perhaps most importantly, it would eliminate much of the confusion created in the minds of some users by those who justify their piratical activities by reference to a supposed "right" to make "back up copies" of entertainment software products.

This public education objective is of critical and immediate importance. During whatever time period is needed for the appropriate amendatory language to be crafted, considered, and enacted by Congress, the current statute remains in effect. Pirates will continue to sow public confusion about what the copyright law says concerning "back-up" or archival copies of computer programs; and with the burgeoning growth of the Internet, their sowing will continue to find fertile ground. Many members of the public are understandably ignorant of their responsibilities to respect intellectual property online; and undoubtedly the persistent references by some site operators to a "back-up copies" exception have blurred the line between right and wrong in the minds of some Internet users.

Even as changes to the law are considered, the Copyright Office and the NTIA should take immediate steps to promote public respect for the law by dispelling the pirate-generated fog around section 117(a)(2). The report required by section 104 of the DMCA provides an excellent opportunity to do so. It is already apparent that the activities undertaken by these two agencies to discharge the tasks assigned to them by Congress in the DMCA have attracted an almost unprecedented level of public attention. The Section 104 study will doubtless enjoy the same degree of public exposure.

1999); Sony Computer Entertainment America Inc. v. Digital Stuff, Inc., No. C-99-710-VRW (N.D. Cal. June 9, 2000).

[8] See Goldstein, op cit., at p. 5:36, describing cases in which this "substantial non-infringing use" argument was rejected. Of course, even if section 117(a)(2) were applicable to these circumstances, which it is not, that would not provide any defense to a claimed violation of 17 USC 1201. See Universal City Studios v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (copyright infringement defenses inapplicable to section 1201).

Accordingly, the IDSA recommends that the Copyright Office and the NTIA use the occasion of the report to Congress required by section 104 of the DMCA to spell out clearly and forcefully the proper boundaries of the exception to protection provided by 17 USC 117 (a)(2).[9] Specifically, these agencies should take this opportunity to stress to the American public that:

- ➢ The archival copying exception in section 117(a)(2) is a narrow exception, and applies only to the extent that it is necessary to make a back-up copy in order to protect the original copy against damage or destruction by mechanical or electrical failure. Thus it generally does not apply to contemporary PC, videogame console, or online gaming environments, where these threats are minimal and archival copying is not needed to prepare for them.

- ➢ Only the legitimate owner of a copy of a computer program can make or authorize the making of an archival copy under section 117(a)(2), and only from a legitimate copy that he or she owns. A web site or other source offering "back-up copies" for distribution to the public falls outside the exception and is committing copyright infringement. If you have a "back-up copy" that was not made from an original that you obtained by purchase or in some other lawful way, the law requires you to destroy that copy.

- ➢ The law forbids the transfer of an archival copy except in conjunction with the transfer of an original and the transfer of all rights in that original. Anyone offering to transfer "back up copies" in any other context is in violation of the law.

- ➢ The "archival copying" exception applies only to computer programs. There is no exception to copyright protection to allow the creation of "back-up copies" of any other kind of work, including sound recordings, music, audio-visual works, or databases, except by libraries, archives, broadcasters, and other specifically identified institutions under circumstances defined by law. Anyone offering unauthorized copies of works other than computer programs as "back up copies" is in violation of the law.

Incorporating such material into the report would be a valuable and constructive use of the "bully pulpit" Congress has provided to the Copyright Office and the NTIA in section 104 of the DMCA. The IDSA would be pleased to assist these agencies in any way possible.

6. Section 109

While the IDSA does not wish to offer detailed comments regarding section 109 at this point, we continue to believe that the statute contains a significant anomaly that is harmful to the interests of the owners of copyright in works embodied in videogames.

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[9] A clear and widely publicized official explication of the statute could also help to negate the claim of lack of willfulness that pirates may now raise to avoid criminal liability. See fn. 4, supra.

Section 109(b) gives copyright owners an exclusive right to control the commercial rental of computer programs, but section 109(b)(1)(B)(ii) specifically withholds this right from the owners of copyright in "a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes." This discriminatory treatment, in our view, was unjustified when it was enacted into law in 1990, and neither the technological changes of the ensuing decade, nor the development of electronic commerce and its related technologies, have made it any more acceptable.

7. Conclusion

The IDSA appreciates this opportunity to provide its perspectives on the subject matter of the section 104 study. We look forward to reviewing the comments received, and stand ready to assist the agencies involved in any way that we can.

Respectfully submitted,

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION

Time Warner Inc.

Time Warner welcomes the opportunity to respond to the inquiry by the Copyright Office and the National Telecommunications and Information Administration regarding the possible effects of Title I of the DMCA on the first sale doctrine as codified in Section 109 of the Copyright Law.

In order to deal adequately with the issues raised by the Request for Comment, it is necessary to understand the basis for and the limitations of the first sale doctrine. The first sale doctrine, in its origin and in its current statutory existence, has as its underlying purpose the prevention of using the Copyright Law to impose price or other conditions on the ability of the owner of a copy of a work to dispose of that copy. The first sale doctrine does so in very simple and clear terms: it provides an exception to the right of distribution granted in Section 106(3). It provides no other exception to the rights granted by Section 106. In particular, it does not provide any exception to the exclusive right of reproduction. Moreover, the exception with respect to the right of distribution is limited to copies "lawfully made under this title".

Since under the first sale doctrine the copy owner has only the right to transfer possession of the copy and no right to make or distribute additional copies, the first sale doctrine is properly applied only when a particular copy of a work changes hands. Two persons cannot have simultaneous possession of a copy. Transferring possession of a copy means giving up possession. If the giver and receiver both have copies, then the scope of the first sale doctrine has been exceeded.

Thus properly understood, the first sale doctrine applies not only to traditional media in which works are fixed, but also to tangible digital media, the most prominent being optical disks containing software, sound recordings and motion pictures. The purchaser of a DVD copy of a movie or a CD copy of a music album owns the chattel involved and may, under the first sale doctrine, transfer possession of it freely. The purchaser may not, however, make additional copies by virtue of the first sale doctrine. In short, the fact that the tangible medium contains works embodied in digital form does not affect the application of the first sale doctrine. It applies in the same manner digital to DVD and analog, i.e., non-digital VHS copies of a movie.

It is clear that Section 109 does not apply to works distributed by transmission because application of Section 109 to such works would involve both the reproduction of the work (as to which no exception is provided and, accordingly, the copy being transferred is not "lawfully made") as well as its distribution. Secondly, the owner of a copy of the work would not be disposing of the possession of that copy.

Some argue that the first sale doctrine must be expanded to apply to works purveyed by online transmission. They advocate a "digital first sale doctrine". But as discussed above, the first sale doctrine is not a digital or non-digital doctrine. It is a doctrine that distinguishes possessory personal property rights from copyrights. When phrases like "digital first sale doctrine" are used, at least by some, the intent is not an application of the first sale doctrine to digital works, but a wholesale expansion of the first sale doctrine in derogation of the rights of copyright owners. To take a newsworthy example, when the owner of a lawful copy of a CD "rips" a song into a digital MP3 file and then transmits that file to one or more friends, the first sale doctrine cannot be invoked to provide legal justification for the reproduction involved and the multiple resulting copies. And the first sale doctrine is hardly applicable when, in the Napster-type context, an individual makes copies available to the world, thus engaging in public distribution of the works involved.

By keeping the first sale doctrine grounded in the transfer of possession of tangible objects, we keep the first sale doctrine true to its purpose: permitting a single copy of a work to change hands. As noted by William F. Patry in his *Copyright Law and Practice*, Volume II, footnote 37, in discussing what the Europeans call the "exhaustion" doctrine: "The rationale behind the exhaustion of authorized material copies - the expectations of consumers or other possessors of the copies that they be able to dispose of those copies as they wish - does not apply to immaterial distributions by television broadcasts or cable and satellite transmissions." That rationale applies with equal, indeed, greater force to digital transmissions. If not grounded in transfer of tangible objects, the first sale doctrine would no longer be a practical, contained limitation on the distribution right with respect to "a particular copy or phonorecod lawfully made under this title"; it would instead open the door to elimination of the reproduction right as well as of the distribution right by permitting creation and distribution of a potentially unlimited number copies.

The first sale doctrine should not be distorted into a vehicle for permitting unauthorized copying and distribution. As stated above, the first sale doctrine, whether in an analog or a digital world has a particular function, i.e., to prevent restraints of alienation of particular "lawfully made" copies by the owners thereof. That policy can continue in the digital world (see, for example, footnote 1 below). There is no social or economic rationale for altering that policy to permit unlimited reproduction and distribution of protected works by owners of a single copy. Indeed, any such alteration would deal a fatal blow to copyright protection.

Turning to the questions posed in the Request For Public Comment:

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

None. Technical protection measures do not stand in the way of a user becoming "the owner of a particular copy or phonorecord lawfully made under this title." Once having acquired such a "copy or phonorecord", the user may "dispose" of it pursuant to Section 109.

(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

No effect has been discerned by us or brought to our attention.

(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

As set forth above, application of the first sale doctrine in electronic commerce and/or digital transmissions generally is potentially of huge danger to content owners. Examination of the purpose of the first sale doctrine reveals, as set forth above, that the doctrine is limited to avoiding restraints on alienation of tangible copies "lawfully made".

(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

The first sale doctrine was developed with respect and applied to tangible copies which are, of course, the carriers of much of the copyrighted works to which we have become accustomed under the existing technology. That doctrine will continue to be applicable to tangible copies made under authority of the copyright owners whatever the nature of the technology such as CDs and DVDs. To the extent, however, that emerging technology deals not with tangible copies but with streaming and/or downloading of digitized programming, the first sale doctrine neither can nor should have any application.[1]

(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The first sale doctrine is related to, premised on and requires for its application tangible copies lawfully made and distributed by authority of the copyright owner.

(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

For the reasons set forth above, the emergence of new technology does not and should not alter the premises upon which the first sale doctrine is established.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

For the reasons set forth above, definitely not. Expansion beyond transfer of possession of a particular copy in a tangible medium will seriously threaten the reproduction right and the distribution right. The first sale doctrine should be kept true to its purpose. Exemptions from copyright must not be obtained through distortion of the first sale doctrine.

(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

The absence of a "digital first sale doctrine" has the positive effect of encouraging the growth of markets for works in digital form. Because content owners are not faced with the dangers that would result from application (in our view, misapplication) of the first sale doctrine to digital transmissions (as described above), content owners are encouraged to make their works available in digital form. They can make those works available for downloading, for streaming and for whatever other new technology develops in a variety of pricing and other arrangements so as to meet diverse consumer needs and desires. Misapplying the first sale doctrine to these businesses would quickly discourage them.

Time Warner will not, at this time, respond to the issues raised with respect to Section 117 but respectfully asks to reserve the right to submit Reply Comments with respect to both Section 117 and Section 109 if it believes that it is necessary to do so.

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[1] We note that the initial downloading of a copy, from an authorized source to a purchaser's computer, can result in lawful ownership of a copy stored in a tangible medium. If the purchaser does not make and retain a second copy, further transfer of that particular copy on such medium would fall within the scope of the first sale doctrine.

Time Warner does not believe that hearings are necessary with respect to the issues regarding Section 109. With regard to the issues raised concerning Section 117, Time Warner respectfully asks to respond to the question about the usefulness of hearings after it has had an opportunity to review the comments and Reply Comments. As to both Sections, Time Warner respectfully asks for an opportunity to participate if hearings are held.

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To whom it may concern:

SPECIFIC QUESTIONS

1. Section 109
ÊÊÊÊÊ(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

So far, the effects are minimal, since a lot of the current publishing methods do not yet have such protection measures. However, it is quite clear, that as such methods are adopted, practices that are today standard and accepted, will no longer be possible. Increasingly stringent protection schemes will tie content not only to a particular user, but also to a particular device. e.g. an electronic book might be tied to the serial number of a particular reading device. Copying and perusing the book to a personal computer may be impossible. Also, the idea to put one's books on a personal web site, such as to overcome the limitation of physical books, and allow one to access the personal library from home, work, travel, etc. may not only be prohibited by licensing clauses, but also impossible due to protection schemes.

All such uses however merely would be using the new media capabilities for what they are meant for, and have nothing to do with copyright infringement. Yet protection schemes may make such use impossible, and the illegality of circumvention of such schemes will severely limit what is possible under circumstances that would clearly be considered fair use today.

ÊÊÊÊÊ(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of the first sale doctrine?

The answer here is pretty much the same as the answer to the question above. Ultimately, in order to ensure the ability to work with content that has protection schemes in place in a way that is possible under current fair use definitions, will require to render ineffective the protection schemes that try to undermine such fair use. If that is done by means of circumvention, alteration, removal, etc. does not matter. The end result is the same, and it's just a matter of what strategy works best with any particular protection scheme.

ÊÊÊÊÊ(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of the first sale doctrine?

Electronic commerce and associated technology has the effect of drastically lowering the costs of publishing and thus increasing the profit margins. Barely any of these benefits were shared with the consumers or artists. In other words, the limited monopoly granted to publishers by means of the copyright laws has benefitted the publishers in a rather lopsided way.

When the discrepancy between distribution costs and content prices grows too large to be ethically justifyable, then the temptation to pirate content rises. Instead of bringing prices in line with distribution, media and other costs, the publishing industry pushed for more stringent laws.

In other words, there is no interest in letting go of the stranglehold and in sharing the benefits of new technology in an equitable way with content creators and consumers.

The interests of the public at large have taken second place to special interests of the publishing industry.

ÊÊÊÊÊ(d) What is the relationship between existing and emergent technology, on one hand, and the first sale doctrine, on the other?

The existing technologies are far from exploiting what is technologically possible. As such the publishing industry has an interest in getting the laws passed first, tested and upheld in court second, before they introduce new technologies that will take full advantage of the new rules.

The rude awakening as to the consequences of the new legislation will come later, when it's too late.

They do this by e.g. going after services like Napster, which essentially only allow people to access each other's files, and which can be equally well used for legal purposes as for piracy, or by suing the people who wrote the DeCSS code, which was written not to pirate DVD content, but to make it possible to view DVD content on non-proprietary devices and software systems.

The two cases mentioned above are conceptually equivalent to trying to outlaw cars, because cars can be used to transport stolen goods or bodies of murder victims, or to sue people who find a way to use cheap unleaded gas instead of expensive lantern fuel in some Coleman gas lantern.

More than that however, these cases also shows how unacceptably vague the law is when it forbids technology that's

> "primarily designed or produced to circumvent a technological measure that effectively controls access to or unauthorized copying of a work protected by copyright, has only a limited commercially significant purpose or use other than circumvention of such measures, or is marketed for use in circumventing such measures."

Such phrasing leaves way too much room for interpretation.

ÊÊÊÊÊ(e) To what extent, if any, is the first sale doctrine related to, or premised on, particular media or methods of distribution?

The first sale doctrine is based on the common sense assumption that intellectual property should be treated like physical goods: it should be legal for the purchaser to use the property anyhow they please, as long as it is used like a physical item, i.e. not at more than one location or by more than one person at once.

Few people would accept a law that prohibits them from lending a CD to a friend, yet for new media the publishing industry tries to exactly establish practices that would be equivalent to that.

As such, the publishers try to convince the public that the new media and distribution channels are "fundamentally different", while in fact, they are not.

The only thing that is fundamentally different, is the increased possibility to tighten the control over content by the publishers and the possibility of increasing profit margins by achieving distribution costs that asymptotically approach zero.

ÊÊÊÊÊ(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which the first sale doctrine is established?

see answer above.

ÊÊÊÊÊ(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

Yes, because just because content is transmitted in digital form does not alter anything about the basic nature.

In other words, fair use practices should apply the same for digital transmissions as for physical media.

There is ethically no difference between making a tape of a record for listening in the car and creating an MP3 file to listen to the same record on the computer at work.

ÊÊÊÊÊ(h) Does the absence of a digital first sale doctrine under present law have any measurable effect (positive or negative) on the marketplace for works in digital form?

Yes, it puts the consumer in a considerable disadvantage, while giving an excessive amount of power to the publishing industry. A typical example is people who buy DVDs either in the US or Europe and then move to another continent. They cannot legally bring and enjoy their belongings, since operating a non-zone conformant device is clearly an intent to bypass and circumvent the region coding built into the DVD distribution scheme.

Further, such region coding (and other protection schemes) can be successfully used to censor information. e.g. China can prevent "poisonous" western thought from entering the minds of the people, by making sure that none of the DVD players sold there can play DVDs from a western zone.

Bypassing and circumventing the various protection schemes is a critical element in the achievement of free speech and world wide competition of ideas, both of cultural and political nature.

Current legislation and increasing technological sophistication will put a severe strain on our free speech rights.

Publishers should either rely on the law for protection against unauthorized copying, and enforce their rights like the owner of any other sort of property, or they should rely on trade secrets. If they do the latter, it should however remain their own task to keep them secret, and if they divulge information to the public, the public should be able to disseminate it without fear of legal repercussion.

1. Section 117
£££££(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

It renders that section essentially ineffective. A well working copy protection scheme will make archival and back-up copies equally impossible as piracy.

£££££(b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

Same as answer to the question above. It just depends on the protection scheme if circumvention, alteration, removal, etc. is the most appropriate form of disabling the effects of such protective scheme.

£££££(c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?

Between the difficulty of making copies and the lack of physical evidence of ownership, it is very difficult to regain access to lost information without paying multiple times. The record keeping in electronic distribution is inadequate. The burden of the risk of loss rests almost entirely with the consumer.

£££££(d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?

The position of the consumer is getting more and more disadvantaged. The only help in the fight for fair use rights is the ability to bypass protection methods if they go too far. This however has been made illegal.

£££££(e) To what extent, if any, is section 117 related to, or premised on, any particular technology?

Section 117 is too narrow in specifying only computer programs. A classic example is the case of so called CD rot: A bunch of CDs for example have problems where the ink corrodes the data layer. The only way to preserve the investment in a legally purchased CD is to make a CD-R copy of such disks before the so called CD-rot makes the data layer unreadable.

DVDs are a very similar technology, with very similar issues. Some DVDs are limited issues, due to licensing rights, and are already now out of print, going for as much as several hundred dollars each in the collectors market. It is quite clear that such disks will sooner or later have the potential to develop defects akin to the CD problems mentioned above. In such case, the investment can only be salvaged by copying the DVD to a different medium, which currently entails the need to break the CSS encryption.

ÊÊÊÊÊ(f) To what extent, if any, does the emergence of new technologies alter the technological premises (if any) upon which section 117 is established?

The section 117 is too narrow in its definition. It is effectively useless, because its execution will in many cases require the outlawed circumvention, removal, etc. of protection schemes.

2. General

ÊÊÊÊÊ(a) Are there any additional issues that should be considered? If so, what are they and what are your views on them?

There are some global considerations, overall trends in the political, cultural and legal environment that need to viewed together, to see the true danger we are facing. Each little legal change by itself may seem innocuous, but put together, the outlook is not very bright.

Publishing used to be a very risky and immensely resource intensive business. As such copyright privileges were granted to the publishing industry. At that time it was clearly understood that these rights granted were revokable privileges, that were solely granted to prevent copycat publishers from going after the profitable items after the competition with potentially huge losses made a particular work successful. In other words, the economics of publishing were at the time such that competition would become ruinous and in the end the public would suffer because of a lack of publishers.

The second purpose, and the only one that can be argued to be founded in natural law, is to protect the creator of the original work, and to ensure he gets properly compensate for his creativity and work.

Times have changed however, and the near-risk free, low-cost publishing methods, including print on demand, CD-R, DVD-R, internet distribution, etc. have largely eliminated the original purpose of protecting publishers.

On the other hand, technological advances have also created technologies that e.g. by means of cryptographic methods, allow ever more stringent control of information, something functionally akin to books that can only be read with special glasses that fit only one particular person's head.

Anything conceptually comparable to lending a book to a friend, borrowing books from a public library, etc. is starting to become technologically impossible. Similarly fair use has been ever more narrowed under the lobbying influence of the publishing industry who can easily outspend and out-organize the public and who have all the tools at their disposal to influence public opinion by manufacturing consent.

Things that were considered fair use, like e.g. making a tape of a record to be able to listen to the music in the car, are not only becoming illegal, due to the necessity to overcome copy protection schemes, but also technically ever more challenging, due to ever more sophisticated hardware and software encryption methods.

By thus getting an increased amount of power, both in terms of legal and technological instruments, the publishing industry is now in a position to have a stranglehold on the public. Within a few years it will be able to dictate to the public technologies that are the equivalent of a book where you pay each time you read a word or a sentence, regardless of how often you have already read and paid for the same word or sentence before.

But the consequences go further: Our western civilization has been able to develop because of the free sharing of information. The age of enlightenment, that brought scientific advance, would not have been possible with today's copyright laws. A large body of classical music typically called "Variations on a theme by..." would have been impossible in todays legal structure. Art forms like collages, be they visual, audio visual, etc. are in danger due to copyright laws. This goes to the core of freedom of expression: you will be prevented from making a political statement by cutting and pasting together excerpts from a particular person's work to show their contradictions or inconsistencies, because the works you copy and paste from are under copyright.

One shocking example of this tendency is the case where a former Scientology sect "priest" who left the cult tried to expose the cult as the religious fraud it is, and quoted from the "secret scriptures" to make his point.
He was sued, his privacy breached, all in the context of violating "trade secrets".
(While this case happened in Finland, these sort of things will happen here, too, given the legal climate currently in place.)

On a similar issue, patent, trademark and service mark protection is similarly expanding in an uncontrolled way under the influence of the monied interests.

In addition, the new technologies produce a social injustice, since information that used to be available for free in public libraries is now only available on a pay-per-view basis, with pricing oriented at the most wealthy clients. e.g. try to get access to historical financial records. These things used to be available for free in libraries. Today they are available in expensive databases that one has to subscribe to for several thousand dollars per year. Similar examples can be found in the legal and medical field, etc. The information is being monopolized by the few who can afford it, putting the rest of the population at a disadvantage.

Meanwhile, the strawman put up by the publishing industry, the artist and creative talent worth protecting, is equally harmed by the new laws: artistic work is now considered work for hire, and thus again decreases the protection of the artist and increases the power of the publishers.

Further, with the increasing pressure for campaign financing reform, the publishers become ever more critical as "king makers" in the political process, for they have an arsenal to control the dissemination of information that by far surpasses everything known to history so far.

If we add to this the concept that companies can get intellectual property protection on nature, i.e. on human, animal and plant genes, that they care allowed to collect personal information and copyright the information, etc. then a man will soon be in a position where it has to pay royalties just to be himself.

All these developments together create a rather disturbing image of the future. It is time to stop the reckless expansion of intellectual property rights, to reexamine their original motivation, and to test what's in the public's interest. We have to be aware of the fact that the economy exists for the people, and not vice versa.
All the wealth created is useless, if it comes at the price of creating indentured servants.

Short term greed is using the fruits of our culture's history to undermine the very principles that made it possible for us to arrive where we are at today. It is a clear case of biting the hand that feeds...

As subversive as it may sound, speaking in economic terms, piracy is a market force. People are willing to pay a premium for original cover art, convenience, the knowledge to support their artist of choice, etc.
However, they are not willing to pay prices that are the result of unfair monopoly pricing.
The Robin Hood's that pirate such works create a market force that makes publishers think about profit maximization in different terms. In an increasingly more enforceable monopoly, thanks to modern cryptography, prices can skyrocket almost without limit. This will eventually benefit a few large publishers and extremely popular artists that with large marketing efforts can sway the public to allocate their limited resources towards the purchase of their works.
At the same time however, this limits the availability of resources for lesser known artists and small publishers. It raises the barriers of entry for those, and thus decreases the cultural diversity.
Piracy forces prices down to that level where the vast

majority of people is willing to pay the premium for a legal copy over pirated works. The lower prices result in more works being bought, and thus it broadens the reach of individual works, and increases cultural diversity, while at the same time lowering the barriers of entrance of smaller players into the market.

ÊÊÊÊÊ(b) Do you believe that hearings would be useful in preparing the required report to Congress? If so, do you wish to participate in any hearings?

Yes, on both accounts.

ÊÊÊÊÊInformation collected from responses to this Federal Register Notice will be considered when preparing the required report for Congress.

Appendix 7

Appendix 7

Reply Comments
Filed in Response to 65 FR 35673

1	Michael A. Rolenz
2	Digital Commerce Coalition
3	Time Warner, Inc.
4	Walter Charles Becktel
5	Reed Elsevier, Inc.
6	American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America
7	Paul Fenimore
8	American Library Association American Association of Law Libraries Association of Research Libraries Medical Library Association Special Libraries Association
9	Software & Information Industry Association
10	Michael (Mickey) McGown
11	American Society of Composers, Authors and Publishers (ASCAP)
12	Bryan Taylor
13	Broadcast Music, Inc. (BMI)
14	Arnold G. Reinhold
15	National Music Publishers' Association
16	Digital Media Association

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Saturday, August 19, 2000

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The following are a reply to the comments on the DMCA previously submitted. As a private citizen, I would like to thank the Copyright Office and the National Telecommunications and Information Administration for giving the public the chance to submit comments electronically and their posting of those comments so that they may reach the broadest audience.

The first comment to which I would like to reply is that of Time Warner Inc. The blending of factual or correct statements with what the writer desires others to believe has been done with superb rhetorical skill but does not provide justification for them. In particular, after one and half pages of discussion of the first sale doctrine, Time Warner Inc. makes the statement that the exhaustion doctrine "...applies with equal, indeed, greater force to digital transmissions" without any justification. As I will discuss below, this is not the case. Digital transmissions are in no way different than high quality analog transmissions and have several drawbacks I assume that Time Warner Inc. is unaware.

In the second paragraph on page 2, Time Warner Inc. states "The first sale doctrine should not be distorted into a vehicle for permitting unauthorized copying and distribution." This is a curious statement to make in a commentary on a law. Laws discuss legality and illegality, not what is authorized and what is unauthorized. As I will discuss below, control of what is "authorized" and "unauthorized" has been a major factor in the Motion Picture industry since its inception. In preparing this reply, I read the U.S. Supreme Court decision "Motion Picture Patents Co. v. Universal Film Mfg. Co. , 243, U.S.S 502 (1917). The parallels between that case decided 83yrs ago and the actions of the DVD industry are striking[1]. The primary difference is that the technology is different. The approach is slightly different but the intention is the same. The issue is not preventing illegal copying. It is having control. This can be seen time and again in the content providers. This was never the intention of the DMCA but without explicit statement of what accesses or protects are permissible, the DMCA allows media providers to decide what is authorized or unauthorized. Any circumvention that is done is illegal under the DMCA and provides the media content provider an insidious control into the home and means of public discourse.

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[1] As the first lawsuit brought under the DMCA, I heartily recommend that all who wrote or administer the DMCA should make themselves aware of the facts of that case and ask how the interest of the public is being served? Is it really in the interest of the public in the long term to allow access controls that only enrich the wealthy corporations? One chilling aspect of that case is the disregard of the first amendment. Another is the traditional role of reverse engineering to create new products. The courts have routinely ruled that reverse engineering ultimately benefits society. Yet in the DeCSS case, seemingly the first amendment, reverse engineering, or even a lack of any provable or significant damages is sufficient. While making his ruling according to the law, the judge seemed aware that the impact of the DMCA in that case was well beyond the intention of that law.

Later in that paragraph Time Warner Inc. states " There is no social or economic rationale for altering that policy to permit unlimited reproduction and distribution of protected works by owners of a single copy." This is fallacious a priori. Access controls prevent even a single copy or from being made and there are reasons for doing so that are "fair use"[2]. As discussed below, digital media cannot be protected by any access control mechanism from reproduction. Ironically, only media pirates would need to make unlimited copies and can do so despite ANY measures allowed under the DMCA. As I will elaborate below, the DMCA does not prevent piracy of any sort. The content providers lobbied for the DMCA as a means to provide control over the public and private use.

Turning now to the Time Warner Inc responses to the questions posed in the Request For Public Comment:

(a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of the first sale doctrine?

> None. Technical protection measures do not stand in the way of a user becoming "the owner of a particular copy or phonorecord lawfully made under this title." Once having acquired such a "copy or phonorecord", the user may "dispose" of it pursuant to Section 109.

It is obvious that the owner of the particular copy owns the physical media but this reply begs the question. To what "technical protection measures" does Time Warner refer? Surely, they have no seer able to know all that can be conceived or even a technical staff able to substantiate this claim. The fact is that technical protection measures CAN be devised that can prevent the user to "dispose of it". Consider the regional coding of the DVD. Purchasers of DVDs are not free to dispose of them outside their region or to persons inside their regions who do not a regional player. This is not a hypothetical but an actual fact. Furthermore, if the devices needed to access the copy are not manufactured any longer what the owner of a copy has is questionable. Under the DVD attempts to make a player would be classified as circumventing access controls even after the industry has abandoned the media[3].

Time Warners Inc. comment is thought provoking. Previous to the 20th Century, all media was "self contained". The owner of a book, a picture, a newspaper, sheet music, or a photograph required no addition technology to use it. With the advent of sound and motion picture recording, that has changed. Some additional device is required. The media have changed considerably from the wax cylinders of the gramophone to the compact disk of today. Changes in technology DO prevent owners of copies from using them once the playback device is no longer manufactured and reparable. This has been to the financial enrichment of Time Warner Inc among other but the benefit to the public is doubtful.

When I was growing up in the 1960s there were books, film, records, and reel-to-reel magnetic or videotapes. While books are still used, Consumers have not been as fortunate with the media for audio or visual. For audio media, consumers have seen the demise of the reel-to-reel tape and LP recording, the rise and fall of the 8-track and the 4 track, the rise and decline of the cassette tape, the rise of the Compact Disk and now DVD audio awaits. The visual media has changed similarly; from the Beta vs. VHS war won by VHS, to the rise and decline of the laser disk and now the DVD. Other than Beta, laser disk, and DVD, I have had recordings in ALL of these formats at one time or the other. Over the years I have noticed that the copyright holders do not always release from master tapes the same recordings as new media is introduced.

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[2] Consider the DVD. The DVD Trust comprised of DVD manufacturer and content provider, Time Warner Inc. , DVD-CCA, MPAA, and the DVD manufacturers have created a system where even a single copy cannot be made.

[3] While our laws cover abandoned real or personal property, they do not cover abandoned "intellectual property" or abandoned media formats. As I consider the types of media or computer file formats that are used or have been used, I am reminded of the Biblical Tower of Babel.

There are specific performances I have on phonograph records[4] that I would gladly pay the full list price of a CD to have but these are not available. The media providers do not release recordings with any speed and prices are kept artificially high. They release inferior recordings not from original master tapes or release edited films that are butchery of a film released in the theaters or on television[5]. They do not release many recordings at all[6]. Also, the makers of the electronics are quick to produce players of the new media and cease production of the equipment needed to play old media. The 1400 records I purchased between 1970 and 1990 may be usable for my entire life but I cannot play them often because of the difficulty of purchasing replacement stylus or phonograph cartridges. Between the producers of recordings and the makers of electronics, the consumer has been repurchasing the same material in different media for over several decades and media players[7]. Almost by necessity has the consumer been recording records onto tapes or CDs. The concept of media shifting has even entered into our legal system. The courts recognized this in the BetaMax case. Congress enacted the Home Recording Act. Now, the use of access controls on digital media and the DMCA would effectively negate both of these, placing the consumer in the position of having to repurchase recordings each time the copyright holders and electronics manufacturers decide on a new and improved media format[8].

The more I consider the DMCA and several of the responses (e.g., Time Warner Inc. Software & Information Industry Association) , I become more convinced that the Digital Millennium Copyright Act (DMCA) is not about protecting copyright owners from immediate piracy of their works. As such the first question is what are the reasons for enacting the DMCA? Existing law is sufficiently clear on what is permissible copying and what is not. One industry group has lobbied heavily that the DMCA is required to prevent widespread piracy of digital works - in no way can the DMCA accomplish this. The "piracy industry" has no need to bypass access controls[9]. *A bit for bit copy of a digital media is indistinguishable from the original.* Statements to the contrary are made in ignorance or with the intent to deceive. Since the DMCA cannot prevent commercial "pirates", to whom is this law directed at primarily? Other then the providers of unlicensed cable box descramblers, the access control provided by the DMCA is directed at consumers. In recent court cases, such as the DeCSS case in New York, it has become quite obvious from the testimony that the intent of several groups who lobbied for this act was to implement *access controls that overturn the BetaMax decision, obviate the Home Recording Act, and create a perpetual monopoly on copyright material.* Since the nature of digital media is understood by few, there are aspects of this media that are unique and have not been considered when the DMCA was enacted. These aspects and the DMCA undermine the base of copyright law.

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[4] For example, one of my favorite records is Leonard Bernstein's 1973 recording of Roy Harris Symphony #3. It is studio recording made at the heights of a great conductor of a work he championed in his youth. The only recording available of that work by that conductor is from an inferior live performance made late in the conductor's life.

[5] How is one to know if there is a butchery of a film or other work until the consumer has paid for and viewed the work. Shrink wrap licenses, caveat emptor and legal complicity exacerbates this situation.

[6] It is ironic that in many states, ownership rights of real property must be exercised at least once a year or the property becomes forfeit. With the current copyright laws, a copyright owner need never exercise that right.

[7] One must ask the question that the media have been changing and the consumer electronics industry has benefited so has the copyright holders through sales of the same material in yet another media and the consumer continues to have to buy new players, new media, and dispose of the old.

[8] The compact disk has been on the market for 15 years. Not only have the prices never come down but now the industry is preparing the DVD Audio to replace it and it is not clear to me what the benefits over a digital compact disk are. As a professional who works with digital signal processing, I know there is little in audio fidelity to be gained by increasing the sample rate over what it is on a compact disk. The "Achilles heel" of any sound system is always the speakers. Improved fidelity of the media will have little impact. DVDs may promise longer playing times but my CD player can play up to 5 CDs in succession. Others can play hundreds. Other than having access control for the benefit of the content provider, there is little rationale behind the introduction of the DVD audio except for those who routinely believe "new and improved" advertising campaigns.

[9] Nor would they care if they did. Piracy is already a crime but since they have no need to circumvent access controls, at least they cannot also be charged with violating the DMCA.

Reading the comments #18 by American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association, I can see that the American library system has legitimate concerns regarding the long term archiving and access to material that has technological access controls. The technology does exist to keep digital material from being used by the general public in libraries and it is not certain that without explicit prohibition in the DMCA that it will not be used. Furthermore, as a professional with some knowledge of digital technology and encryption, there are aspects of this technology that they are probably not aware and ultimately must be addressed during the discussion of the best way to handle digital media and transmission. Some of these concerns were addressed by others (e.g., Robert S. Thau & Bryan Taylor). Rather than provide a point by point affirmation or commentary, the remainder of my comments are general and amplify points made by several comments.

While the Digital Millennium Copyright Act (DCMA) addresses some of aspects of "fair use" of digital media, there is one aspect "fair use" for the previous generation of analog media that it does not address-"partial" use when the media is damaged or aged. Previously, the media for communications has always been an analog nature-books, film, phonograph records, video or audiotapes. One aspect of these media has always been that if it is physically damaged, one can still get some use out of it. A book that is waterlogged can be dried out. Torn pages can be mended or replaced with photocopies. Bindings can be replaced. Scratched or warped records may still be played. Magnetic tapes can be spliced. The videotape that is crinkled by my VCR can be pressed flat and rewound into the cassette. Even though compact disks are digital media, they are not encrypted. In each of these cases, damage done to one part of the media only degrades the quality of the media and does not destroy the information on it.

This has always been the case for all media used to this time and it has become so implicit in the definition of "fair use" that is taken for granted. This is not the case for digital media that uses encryption as part of its access control method. The intolerance of encryption systems to even minor damage is not a weakness but is inherent. This has never been an issue before; which is one reason it has not been considered in the creation of the DCMA. One claim for the reason for the DCMA has been that digital format can be copied without degradation from copy to copy. This is actually not true since bit errors will always occur in copying albeit with small probability. What has not been addressed in the DCMA is the fact that encryption techniques used for effective access controls can magnify the effects of a single error into hundreds or thousands.

As Claude Shannon proved in 1949[10], cipher systems which do not produces widely different output for small differences in either the key or "plaintext" are more easily "cracked" than those that do. If even one bit is different in either the key or the text, then a strong cryptosystem should produce scrambled output until the system resynchronizes. This creates some difficulties when the encrypted "cipertext" is transmitted over some communications channel such as radio, cable, Compact Disk (CD) or a Digital VideoDisk (DVD). There is always some chance that bit errors will occur. When this happens, a strong cryptosystem produces what appears to be random data. If the errors occur often enough, the cryptosystem produces a scrambled output stream. The stronger the encryption scheme, the more likely this will happen. In addition, access control systems using encryption are likely to prevent any access in the event of damage.

For storage of digital media, the current choices are the Compact Disk (CD) or the Digital Versatile Disk (DVD). While these media are reputed to have long lives, it is doubtful that they will exceed that of parchment, paper, or possibly even a 78-rpm record. As they degrade or are damaged, the encryption used in access control is likely to render them completely unusable[11]. For these reasons, librarians, archivists, and consumers have reasons for concern because what the *DMCA does not require is time limits on the access control.*

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[10] C. Shannon, "Communications Theory of Secrecy Systems", Bell Systems Technical Journal (1949), pp.,656--715. Shannon applied the "theory of information" he had create to all known ciphers up to that date. He proved that the only theoretically unbreakable cryptosystem was the so-called one-time-pad of random numbers. He introduced the criteria used to evaluate cryptosystems. One criteria is the measure of randomness of the "ciphertext" as a function of small changes in the cipher key.

How then are the copyright materials on digital media to pass into the public domain at the expiration of copyright? Media purchased during the copyright period still have access control protection but the DMCA would make it illegal to bypass this access control since the means to do so has been made illegal. Is the creator of the media required to lift the access protection? Are they required to produce copies without access protection after that point AND have an exchange program exchanging older copies? Will the copyright holders merely keep producing new versions with extra footage, sound, effects, digitally enhanced special effects etc., that allow them to copyright new versions and claim that anyone who circumvents the new copyright version to access public domain material violates the DMCA so that NOTHING can enter the public domain? Would they even be in business? If the method of access control is kept secret, could anyone determine what it was? *The use of access controls of digital media has the ability create a perpetual monopoly on copyright material. This is counter to the basis of copyright law.*

Time Warner Inc. in several places uses the phrase "unauthorized". Exactly what "unauthorized" copying or access is not defined. But then, One other aspect of the DMCA that is of concern is that it discusses devices used for access control but *at no time does it explicitly define what accesses to copyright material can be legally controlled or what are appropriate for what material.* Does the copyright holder have the right to determine where or when copyright material can be accessed? Does the copyright holder have the right to control what copyright material is accessed or in what order?[12] The technology exists to do this today to do this. Unless defined, the DMCA allows the copyright holder the new ability to create arbitrary definitions of access and then provides a legal means to prevent make circumventing these bizarre access controls[13] illegal or allow media provider to devise new "authorizations."

Another aspect of the DMCA that borders on the bizarre, are the provisions allowing "researchers" to study systems with permissions from the creators. The creators of any access control system are hardly likely to grant it. Furthermore, if the access control is so weak that it can be cracked without knowledge of the algorithms, why should it be given any legal protection or make criminal the activities of persons more skilled than the creators? Seemingly in the recent DeCSS case, the amateurs possess greater skill than the "professionals." Why a corporation would give permission to have their expensive access control systems tested by the truly gifted rather than their paid experts when the DMCA provided protection from professional incompetence is considerably bizarre.

For the above reasons, I believe that the whole reasons for the DMCA need to be reconsidered. Since in no way it can eliminate illegal piracy, the lobbyists for this seem more intent upon creating a technologically monopoly. At a minimum, the deficiencies and ambiguities in its current version that do not address even the existing technology should be repaired.

Sincerely,

Michael A. Rolenz

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[11] The end result would be nothing but random bits and not even be recoverable as 78-rpm recordings can be.

[12] While controlling access to parts of a copyrighted database would be reasonable, is allowing the maker of a DVD audio to control the order in which the songs are played reasonable?.

[13] The concept of disabling the fast forward on a DVD video seems ridiculous but is required by the DVD association. So too is disabling scenes or other features on a DVD. The notion of having DVDs that can only be played on machines purchased in certain regions is also bizarre.

Digital Commerce Coalition

DIGITAL COMMERCE COALITION

DCC
01000011

August 30, 2000

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Re: DCC Reply Comments Relating to the Joint Study by the Copyright Office and NTIA on Sections 109 and 117 of the Copyright Act

Dear Messrs. Feder and Joyner:

Pursuant to the *Federal Register* notice of June 5, 2000 entitled "Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act," the Digital Commerce Coalition ("DCC") submits the following comments with the Copyright Office and the National Telecommunications and Information Administration ("NTIA"). This response is directed particularly to the comments filed on August 4th by the Digital Future Coalition ("DFC"); jointly by the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association (the "Libraries"); and Patrice Lyons.

Digital Commerce Coalition

The Digital Commerce Coalition ("DCC")[1] was formed in March 2000 by business entities whose primary focus is to establish workable rules for transactions involving the production, provision and use of computer information – digital information and software products and services. DCC members include companies and trade associations representing the leading U.S. producers of online information and Internet services, computer software, and computer hardware. Together we represent many of the firms that have led the way to the creation of new jobs and new economic opportunities that are at the heart of the new electronic commerce.

Our common goal is to facilitate the growth of electronic commerce. We believe that the enactment of the Uniform Computer Information Transactions Act ("UCITA") in every state best advances that goal. UCITA is a well-considered statute that balances the interests of all parties in forming workable contracts and licenses for computer information. By adapting and modernizing traditional tenets of U.S. commercial law for the digital age, UCITA will bring uniformity, certainty and clarity to electronic commerce across the 50 states.

General Observations

As a general matter, DCC feels it important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. For over 50 years, the Uniform Commercial Code ("UCC") has governed the relationships between sellers or lessors of hard goods – on the one hand – and buyers or lessees of those goods – on the other – including in many instances hard copies of informational products and services. The various Articles of the UCC have worked well in fostering commerce across the various states, which have in turn adopted the Articles largely in a uniform manner.

UCITA is a new model commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). As with the Uniform Commercial Code, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce. UCITA is intentionally broad in scope. The intent is to cover all materials and information that may be the subject of electronic commerce. Thus, the Act covers "computer information," and covers transaction for software, electronic information – including copyrighted works – and internet access. As has been traditionally the case with uniform laws in this area, UCITA sets rules governing agreements between private parties in the licensing of computer information. It does not create or alter the property interests that persons may enjoy in respect to these products. Those property interests are determined by relevant state and federal laws, including the federal Copyright Act. This careful balance is one upheld by the courts as necessary to the effective and efficient provision and use of information,[2] and one that both the federal and state governments must strive to maintain.

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[1] DCC members include: America Online, inc.; American Electronics Association; Adobe Systems; Autodesk, Inc.; Business Software Alliance; Intel; Information Technology Association of America; Lotus/IBM; Microsoft; National Association of Securities Dealers; Novell; Reed Elsevier Inc.; SilverPlatter, Inc.; Software & Information Industry Association; and Symantec.

In this context, DCC is concerned that the comments submitted by DFC, the Libraries and Ms. Lyons as a part of this proceeding go to issues far beyond the scope of the study mandated by Congress. In so doing, they confuse the distinctions between federal copyright law and state contract and licensing statutes. Given the importance of licensing to the information industries and their customers, as well as their reliance upon contracts for flexibility and product variety, this concern is of no small moment.

The original study proposal adopted by the House Commerce Committee in 1998 as an amendment to the *Digital Millennium Copyright Act* ("DMCA") would have required a sweeping review of the relationship between copyright law and electronic commerce generally. However, that proposal was altered significantly before passage of DMCA by the full House later that year. As finally enacted, the scope of the study was limited to apply only to sections 109 and 117 of the Copyright Act. Congress neither desired nor mandated that other issues be studied.

Section 104 of DMCA requires the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to jointly evaluate solely:

> (1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and
>
> (2) the relationship between existing and emerging technology and the operation of sections 109 and 117 of title 17, United States Code.

Despite the fact that the ongoing study is clearly limited to this two-pronged inquiry involving federal copyright protections – and limited exceptions thereto – DFC, the Libraries and Ms. Lyons raise issues and make recommendations related to section 301 of the Copyright Act, as well as comments directed at UCITA and the general licensing practices of computer information providers. Again, there is no mandate from Congress for the study to become a boundless discussion on or inquiry into the licensing of copyrighted software and information products and services.

The comments submitted by the three commentators mentioned above clearly do not fall within the scope of the section 104 study, and DCC maintains that this is not the proper venue in which to raise these comments. For this reason, DCC respectfully requests that the Copyright Office and NTIA disregard these comments.

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[2] See: *ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)*, rev'g 90 F. Supp. 640 (W.D. Wis.)

Statements Regarding Validity of Licensing Agreements and UCITA

Both DFC and the Libraries request that the study recommend amendment to 17 U.S.C. 301 that would interfere with states' rights to govern agreements between private parties. It is a long accepted principle of American jurisprudence that parties should be free to form contracts as they see fit. Provided such contracts are not unconscionable, or illegal, UCITA – consistent with long established practice and jurisprudence – sets up rules as to when a contract is formed and lays out the respective parties rights and obligations.

With this in mind, we believe that the requests made in the submissions are based on anecdotal evidence and unattributed terms from contracts presumably negotiated between licensors and licensees. More disturbing, the requests rest on a false presumption and a mischaracterization of UCITA.

UCITA is a new, uniform state commercial code developed over almost a decade and approved by the same body – the National Conference of Commissioners on Uniform State Laws ("NCCUSL") – that wrote the Uniform Commercial Code. UCC Article 2 contains uniform contract rules for sales of goods. It has been the only uniform body of state contract law for over 50 years. NCCUSL wrote UCC Article 2 to accommodate the shift from an agrarian economy to a manufactured goods economy, since the contract laws written for the former did not work for the latter.

NCCUSL wrote UCITA for the same reason – the economy has shifted from a manufactured goods economy to an information economy. The existing legal infrastructure provided by UCC Article 2, which was written for goods, does not work well in facilitating electronic commerce; therefore, NCCUSL drafted and approved UCITA as a new model law for the states to adopt.

UCITA is intended to help facilitate the new electronic commerce that is dependent on licensing of computer information – including software, electronic information and internet access. As has been traditionally the case under U.S. law, UCITA is designed to complement the provisions of federal law – in this instance generally the copyright, patent and trademark laws.

That contract law and intellectual property laws can peacefully co-exist has long been the case.[3] Although the availability of computer information and its importance is increasing, there is no need for changes in the Copyright Act of the kind proposed by the DFC and the Libraries. There is, however, a need for a uniform contract rules that apply to information. UCITA meets that need.

DFC's comments would lead an uninformed reader to the conclusion that UCITA ignores the supremacy of federal law.[4] The Libraries' comments would lead one to a similar conclusion.[5] To set the record straight, UCITA does contain specific reference to the supremacy of federal law and does so in the context appropriate to a state-created statute governing contracts and licenses. Section 105 of UCITA reads as follows:

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[3] *See e.g.*: Raymond Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKLEY TECH. L. J. 827 (1998) (explaining the long standing symbiotic relationship between contract and property law).

> (a) A provision of this [Act] which is preempted by federal law is unenforceable to the extent of the preemption.
>
> (b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.[6]

The Reporter's Notes accompanying this section – similar to congressional legislative history – make clear that "fair use" is an important part of the considerations a court should weigh in determining the validity of a contract:

> The offsetting public policies most likely to apply to transactions within this Act are those relating to innovation, competition, fair comment and fair use. Innovation policy recognizes the need for a balance between protecting property interests in information to encourage its creation and the importance of a rich public domain upon which most innovation ultimately depends. Competition policy prevents unreasonable restraints on publicly available information in order to protect competition. Rights of free expression may include the right of persons to comment, whether positively or negatively, on the character or quality of information in the marketplace. Free expression and the public interest in supporting public domain use of published information also underlie fair use as a restraint on information property rights. Fair use doctrine is established by Congress in

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[4] ". . . we hope that the report will recommend new legislation, perhaps in the form of amendments to 17 U.S.C. Sec. 301, that would provide a clear statement as to the supremacy of federal law providing for consumer privileges under copyright over state contract rules which might be employed to enforce overriding terms in "shrink-wrap" and "click-through" licenses." *Comments of the Digital Future Coalition*, p. 3.

[5] "However, as the debate over the proposed Uniform Computer Information Transactions Act ("UCITA') has demonstrated, unless an express federal digital policy preempts state laws, content owners will continue to turn to local laws and restrictive licensing agreements as a way of forcing members of the public to waive the very federal rights that Congress reserved for the public – including those rights that flow from the first sale doctrine on which so many library practices depend. *Comments of the Library Associations before the Library of Congress, the United States Copyright Office and the Department of Commerce, National Telecommunications and Information Administration, Inquiry Regarding Sections 109 and 117) Docket No. 000522150-0150-01*, p. 25.

[6] *See*: Draft Approved at Annual Conference, July 23-30, 1999

> the Copyright Act. Its application and the policy of fair use is one for consideration and determination there. However, to the extent that Congress has established policies on fair use, those can taken into consideration under this section.[7]

The Reporter's Notes also make specific reference to 17 U.S.C. 1201(f) and (j), those provisions of DMCA that govern the limited circumstances under which reverse engineering is permissible where it is needed to obtain interoperability of computer programs.[8]

In short, UCITA does not say *whether* a contract can be made under federal law, but *how* it may be made *if* it can be made. Subsection 105(b) in particular emphasizes that fundamental public polices regarding fair use, reverse engineering, free speech may not be blindly trumped by contract: courts are directed to weigh all the competing polices, including freedom to contract.

While these UCITA provisions may not meet the over zealous demands of DFC and the Libraries for new statutory creation of rights for users of computer information, it is clear that this state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies – including the applicability of the Copyright Act's fair use exceptions and the latest provisions of DMCA. To do otherwise would have risked disturbing, or even destroying, the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses.

Ms. Lyon's comments regarding UCITA likewise demonstrate a misunderstanding of the relationship of copyright law and state contract law. For example, she questions whether the UCITA definition of copy includes a digital fixation and how that relates to the Copyright Act. The answers are simple and already explained in the Reporter's Notes. The UCITA definition does include digital fixations and it does not relate to the Copyright Act:

> "Copy." This term refers to the medium containing the information. The medium can be tangible or electronic. The time when information is fixed on the medium can be temporary if this fulfills the required performance. **The copyright law question of when a copy occurs within computer memory or in a transient image does not relate to contract law issues and is not dealt with in this Act**. *Stenograph v. Bossard*, 46 U.S.P.Q.2d 1936 (D.C. Cir. 1998); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).[9]

State contract law has its own need and use for the concept of "copy," e.g., a licensor has a duty to tender a copy and licensee has a duty to pay upon tender. Unless there is a definition of copy commensurate with the purposes of contract law, contract law fails.

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[7] *See*: March 2000 Comments § 105, cmt. 3

[8] *Ibid*.

[9] *See*: March 2000 Comments, § 102, cmt. 17, emphasis added.

Ms. Lyon's comments regarding the UCITA definition of "computer program" are similarly resolved. The first sentence of the definition used in UCITA is exactly the same as that in the Copyright Act, and therefore should not pose a problem. The second sentence in the definition is intended to make a state law distinction important for purposes of contract law. Again, the Copyright Act is not affected and the Reporter's Notes explains this point clearly:

> "Computer program." The first sentence parallels copyright law. 17 U.S.C. § 101 (1998). The second sentence distinguishes between computer programs as operating instructions communicated to a computer and "informational content" communicated to human beings. . . . **The definition pertains solely to contract law issues. It does not relate to the copyright law issue of distinguishing between a process and copyrightable expression**. . . . .In this Act, the distinction relates to contract law issues such as liability risk and performance obligations.[10]

Rather than treat each additional comment offered by Ms. Lyons, we summarize by noting again that intellectual property laws and contract laws serve different but vital purposes. State contract law must bow to federal law and UCITA does that. Nevertheless, UCITA fulfills a vital purpose in facilitating electronic commerce, and that purpose should not be confused with the one accomplished by intellectual property laws.

Conclusion

The Digital Commerce Coalition has as its primary purpose and goal the enactment of UCITA in the 50 states in order to facilitate effective electronic commerce. Nevertheless, DCC and its members are also concerned that other activities, including this current study at the federal level, not go forward without a clear understanding of the nature of UCITA and its intended effects. Unfortunately, comments submitted by DFC, the Libraries and Ms. Lyons in the course of this study are far outside the scope of the congressional mandate given to the Copyright Office and NTIA. For that reason alone, DCC would urge that they be ignored.

Equally important, DCC feels it necessary to correct the mischaracterization and misunderstanding of UCITA, particularly its provisions governing the supremacy of federal law – including the Copyright Act. UCITA fully anticipates and preserves the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the states' role in determining agreements among private parties, including contracts and licenses. It does nothing to undermine the Copyright Act or the rights and exceptions to rights established thereunder. DCC urges the Copyright Office and NTIA to give similar cognizance to the importance of maintaining that delicate balance at the federal level, as they prepare the mandated report to Congress.

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[10] *Ibid.* at cmt. 10, emphasis added.

Respectfully submitted,

Daniel C. Duncan
Executive Director
Digital Commerce Coalition

Time Warner, Inc.

Reply Comments

Time Warner Inc. appreciates the opportunity to submit these Reply Comments in Docket No. 000522150-0150-01 with respect to Sections 109 and 110(7) in an effort to extirpate the baseless conjectures on which much of the Comments rely. What is fundamentally involved in this inquiry is, on the one hand, a chimera made up of suppositions and predictions about future behavior of content owners and, on the other hand, real and soundly based apprehensions concerning what would happen to digitized works in the absence of adequate technological protection.

This clash between imagination and reality becomes particularly significant in the context of suggestions that the first sale doctrine be expanded to apply to digital transmissions. It is worth noting that, as Time Warner Inc. said in footnote 1 to its comments, a digitized work that is sold in a tangible medium could well be the subject of a first sale. The problem presented by some of the Comments is that they would extend the first sale doctrine to digitally transmitted works. In those situations, retransmission of the work (as is sought in those Comments) would require reproducing it and could, in many if not all cases, lead to distribution of the work to a multitude of recipients. This is because (as Time Warner pointed out in its Comments) the first recipient of the work retains, after the (or many) retransmission(s), the "copy" that was received. This, of course, is precisely the opposite of what the first sale doctrine contemplates and, indeed, requires for its proper functioning.

This possibility of distribution of the work to an unlimited number of recipients is a very real one. When that certainty or near certainty is weighed against the unsupported concerns expressed by some of the Comments, it is clear that any decision must come down on the side of keeping the first sale doctrine to its present office. **A CONTRARY RESULT WOULD MEAN THAT CONTENT OWNERS WOULD NOT DARE TO MAKE THEIR WORKS AVAILABLE FOR TRANSMISSION ON THE INTERNET. THIS WOULD BE A GREAT LOSS TO THE PUBLIC INCLUDING THE ENTITIES AND INDIVIDUALS WHO HAVE SUBMITTED COMMENTS.**

Many of the Comments make the assertion that content owners will encrypt digital works and refuse to allow decryption in order to prevent fair use and/or to impose unreasonable terms on those wanting to make authorized use of the copyrighted work. Quite apart from the irrelevance of that contention to this inquiry, it is without basis. Certainly today, when a work is made available in digital format (and assuming for purposes of discussion that the work is not available in analog format), the distributor of that work is not only willing but eager to have the work decrypted by consumers for viewing and/or listening. To do otherwise – to refuse to allow decryption or to charge an unreasonable fee – would be a suicidal business practice.

Some of the Comments devote significant time and space to the assertion that the motion picture studios insist on controlling not only the physical embodiment of their copyrighted information, but the player used to transform it into intelligible video and audio information as well. Although it is not clear that this assertion has any relevance to the issue at hand, it might be well to say a few words about it. It is true that the technological protection created, for example, for DVD requires for access to the copyrighted work that it be played on a licensed player. This is a function of the state of today's technology. We are not yet at the point where a "unilateral" technical protection can be inserted in, for example, a DVD that would permit access only with the authority of the copyright owner. For the time being, it is necessary to achieve protection somewhat indirectly by including the technology in both the player and the medium carrying the work. In no way does this disadvantage consumers or any other public interest. The fact is that, because implementation of this technology requires the active agreed participation of manufacturers of consumer electronic devices and personal computers, the interests of consumers, the customers of those manufacturers, are fully taken into account. Furthermore, the studios have no interest in selling players or in what players are used (indeed, there is no restriction on the availability of licenses to manufacture them) as long as the players will not allow reproduction or retransmission without authorization of the copyright owner.

Perhaps the groundlessness and dangers of the arguments seeking expansion of the first sale doctrine is best crystallized on page 3 of the Comments of the Stanford Linear Accelerator Center:

> Like owners of "old technology works" (such as printed books), owners of works in digital forms should be included in the first sale doctrine. It has long been recognized that a consumer that buys a product also has a right to resell that product. Although digital works are easily reproduced, this is not a reason to not extend the first sale doctrine to owners of digital works. The principles of the first sale doctrine must apply equally to all products. The first sale doctrine should not be limited to certain works only because some works are easier to reproduce than others. Other methods must be developed to control reproduction rather than changing the fundamental principles of the first sale doctrine.

The reference to " . . . some works [being] easier to reproduce than others" is a monumental understatement. It is, perhaps, this lack of appreciation of the huge danger faced by content owners if digitized works are not adequately protected that leads to the proposition that digitized transmissions should be subject to the first sale doctrine just as are tangible copies. The fact is that digitized works and particularly transmissions thereof are not merely a step or two away from tangible copies along some spectrum of change. They are different in kind in dramatic ways that make them subject to easy and inexpensive reproduction, distribution, and modification. It is that difference that was recognized by the international community and led to the enactment of the two WIPO Treaties and of DMCA in implementation thereof. It would be a betrayal of those achievements and a violation of this country's international obligations if it cloaked digital transmissions with the first sale doctrine, thereby weakening if not eliminating copyright protection for them. At bottom, moreover, "ease of reproduction" is not the issue here. The first sale doctrine should not be expanded to allow any reproduction at all.

Also groundless is the argument (Comment number 16) to the effect that the prohibitions on circumvention alter the intended effect of the first sale doctrine by allowing the copyright holder to insist that each subsequent "owner" obtain a new authorization. This argument seems to assume that there is something invidious or at least unusual in requiring separate payments for separate uses. Distributors of pay-per-view programming, operators of movie theaters, and trolley car conductors, among others, would be startled by that notion. What one can anticipate is that the market, driven by the respective interests of content owners and consumers, will produce a variety of pricing choices. More fundamentally, this Comment ignores the requirements of Section 109 that the first sale doctrine applies to "a particular copy . . . lawfully made under this title." [This limitation, its rationale and its significance were discussed in Time Warner's Comments.]

The argument (see, for example, Comment number 17) that the DMCA is being interpreted to create a "dangerous tying arrangement" between the right to vend copies and the right to authorize access is not only groundless but, very importantly, it ignores the critical necessity as described above for the technological protections and for not extending the first sale doctrine to digital transmissions. As to the groundlessness of the argument, there is no requirement that one right be "bought" in order to be able to "buy" the other. Using DVD as an example, a consumer can "buy" access and view the picture. To speak of a "right to vend copies", however, begs the fundamental question of whether one who receives a digital transmission may "vend copies" thereof. Clearly, "vending copies" would infringe the reproduction right and involve distribution of a large number of reproductions, all while leaving the "vendor of the copies" with the "original" – something neither contemplated by the first sale doctrine nor consistent with its goal but, rather, destructive of copyright protection.

Comment Number 18 encouragingly recognizes that the first sale doctrine distinguishes between ownership of a copyright and ownership of a copy and speaks of a "copy" as "the tangible material in which a work is fixed." It also appears (see p. 6 particularly) that, at least to a large degree, the concerns of the libraries are to a significant degree focused on developments that they believe to create inconveniences or budgetary problems; none of these complaints justifies making the disruptive change suggested for the first sale doctrine. Moreover, some of the complaints appear to have little if anything to do with the first sale doctrine, for example, a complaint that many databases are available on only one computer in a library, so that only one user can dial in at any given time. This appears to be more a complaint about the inclusion of a number of works on one medium rather than anything having to do with first sale.

The Comments assert that licensing terms routinely affect uses that were traditionally lawful under the first sale doctrine. I am not aware of any such restrictions imposed by Time Warner but, be that as it may, we are once again faced with an assertion that is irrelevant to the issue in this inquiry. Contractual restrictions may be imposed whether or not the first sale doctrine is involved.

Comment Number 18 does at one point (p. 20) touch on the issue involved here. The paper expresses disagreement with the view that, because the first sale doctrine limits only the distribution right and not the reproduction right, it may not be applied to digital transmissions. According to the Comment, a proper application of Section 109 takes into account necessary activities incidental to application of the doctrine, such as reproduction. "Reproduction," of course, has never been a "necessary activity incidental to application of the doctrine." Quite the contrary. Both in its common law origin and its current statutory formulation, the first sale doctrine dealt and deals with only "a particular copy . . . lawfully made under this title." **THE CENTRAL POINT THAT MUST BE RECOGNIZED IN THIS INQUIRY IS THAT IMPORTING A LIMITATION ON THE RIGHT OF REPRODUCTION AS A NEW AND ADDITIONAL ELEMENT OF THE FIRST SALE DOCTRINE WILL DESTROY COPYRIGHT PROTECTION FOR DIGITALLY TRANSMITTED WORKS.** The only authority the paper cites for its assertion is Section 117, "Confirming that an owner of a copy of a computer program does not infringe the reproduction right by copying that program as an essential step in use." That statutory limitation intended to meet the particular needs of computer program owners provides no support for applying such a limitation to digitally transmitted works generally.

A number of the Comments express approval of the approach taken by proposed legislation (H. R. 3048) introduced in 1997, which would have amended the first sale doctrine to include digitally-acquired media. That proposal was not accepted by the Congress apparently because it appreciated the grave dangers to copyright that it would engender. In Time Warner's view, until such time as one can feel comfortable that technology has been developed and widely deployed that can provide the security necessary to protect against the making of more than one "copy" and the retention of the original "copy" by the transmitter, it would be premature to give that approach serious consideration. In the current state of technology, extension of the first sale doctrine to digitally transmitted works would destroy copyright protection for such works and cause content owners to have serious second thoughts about making their works available on the Internet.

One of the Commenters, The Digital Media Association (No.21), raises an "additional issue," the suggestion that Section 110(7) should be amended to provide that (i) "online record sites are the equivalent of 'physical establishments' and that the transmission between the e-tailer and the consumer is equivalent to the 'immediate area where the sale is occurring' and (ii) the 'retailer exemption' should be extended to digital public performances of sound recordings in both physical and ecommerce record retail establishments."

The limitation of the "retailer exemption" in Section 110(7) to performances that are not transmitted "beyond the place where the establishment is located and [are] within the immediate area where the sale is occurring" was included for an obvious and good reason. Without such a limitation, the performance at a "vending establishment" would be widespread and constrained only by the technical limitations of the performing equipment. That is what would happen if this proposal were adopted. Online performances would be worldwide and be destructive of rather than, as the Comments suggest, helpful to sales of copyrighted music. Indeed, the proposal, if enacted, would result in doing for music retailing exactly what the Comments decry, "slowing the growth of ecommerce, diminishing consumer welfare and potentially stifling the online consumer market."

Time Warner respectfully asks for an opportunity to present its views with respect to Sections 109, 110(7), and 117 if there should be hearings and/or if further Comments should be called for by the Copyright Office or the National Telecommunications and Information Administration.

These Reply Comments are submitted by:

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Saturday, September 02, 2000
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REPLY COMMENT

Dear Sirs,

Please allow this "reply comment" including the following **errata** with **addendum** to the respondent's original **COMMENT** of 8/2/000 listed below in the concern of the request for comments dated 6/5/000 on Title 1 of the Digital Millenium Copyright Act - comments for the **sections 109, 117, and General** comments either directly related; or as in the case of the respondent, indirectly related, but pertaining to **Title 17 USC Copyrights** per the "**specific questions**" section, **question #2** - "General", (a) "Are there any additional issues...?".

Original text will be in ***italic***, and the errata and addendum texts will be in regular, **underlined** type. The existance of **bold** or elsewise has nothing to do with the errata or/and addendum information. Deleted text will be set off by asterisks at the begining and the end of the deletion (* *), any new text to be entered between the asterisks and likewise underlined

---

ERRATA COPY, WITH ADDENDUM

Walter Charles Becktel
Primary (Senior) Oracle/* */Lyricist and Artist
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COMMENT

Dears Sirs,

Per the DMCA of 1998, and your request for comments dated 6/5/000 on title 1 of the Act, I would like to add the following:

It firstly seems dubious to me, that no definition(s) have ever been added for "author" in Title 17 USC Section 101. Possibly this doesn't SEEM to have anything to DO with any such "Digital Millenium" bologna, but in LIGHT of the fact that recent awareness has revealed that several of the so-called "authors" of these same "works" that you all keep ARGUING about, are in fact recipients of stolen lyrics either through eavsdropping, "careful observance", or unwelcomed transcription/tape recordings; it would seem to me MORE than appropriate at THIS time to at least come up with some sort of a tentative DEFINITION of the word - because as it stands now, the general vagueness of the Statute seems to be causing MOST people to believe that, "if I just hurry on UP over there to the Copyright Office, and get that copyright on these WORDS that I wrote down, then I don't HAVE to give any credit, ON the copyright form or elsewise, to the person(s) I stole the recital(s) FROM...he he he". Scenerio #4: Lets say your *Stenographer kipes off with* *one of your* *dictations, runs* on *over to the copyright office, copyrights the*

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dictation, and then *says SHE is the sole author* of the dictation *- get the point?* *Any* *person who "overhears" another person's recitals, especially if he is another artist, and goes and copyrights those same transcriptions WITHOUT mentioning the name(s) of the persons whom he or she "borrowed" them from, is just as much a thief as that STENOGRAPHER* is*. And apparently, we've been having quite a BIT of this sort of theft going on* lately*; and I think that it is all DUE to the fact that there isn't any solid definition of the word "author" per se.*

*So please DO allow me the following proposal, an*d *possibly* also *for a couple of OTHER words; 'cause, how can* any of *you go ON with this "copyright" business, when you guys haven't even "gotten off the ground" about WHO the AUTHOR is?*

The following is per the "Specific Questions" section of the "Request for public comment", question #2 - "General"; (a) "Are there any additional issues...?"

Proposed Title 17 USC Section 101 additions:

> ***"AUTHOR"****, is he who either dictates for a recorder, or puts the words down himself into the "tangible medium". The RECORDER (secretary, scribe, stenographer, etc.) is NOT the author except where that person's individual contribution can be ascertained, AND with the permission of the author - and then at best is only a CO-AUTHOR as in the case of a professor and his understudy. One does NOT need to hold any title or office to qualify as being "author" per se; "author" is not a legal designation, but only a condition of fact. It is not a condition of poverty or wealth,* of *education or retardation, mental, physical, sexual, or spiritual fitness; and any such person alienating one such author for any of the aforesaid reasons, or any OTHER reason, is liable to the prosecution of which under Federal*, State, or Local *Laws either through civil litigation or/AND criminal prosecution.*
>
> ***"TALKER"****, is a modern day lay term for an oracle, prophet, seer, sooth sayer, or the like. For the purposes of this section, said "talker" is also an author. When one takes dictation from one such "talker", he acts as nothing more than a scribe, secretary, or stenographer, unless additional co-authorship can be ascertained.* Although he CAN be, for the purposes of this section (and for the most part), a "talker" is **NOT** a Tarot Card reader or/and any such person who normally would be associated as to delving into the COMMERCIALLY SUPERNATURAL; although those who are "into" such things tend to freely violate a "talker's" privacy. Generally, "talkers" are REAL PEOPLE; but although the violation of their civil rights is CUSTOMARY, it is not legal under federal law to proceed against ANY person in or WITH a custom which violates his civil rights. Doesn't matter for how many **CENTURIES** they've been doing IT! In the United States it's, "don't mess with MY prophet, and I won't mess with YOUR seer". The penalties for such a violation are prosecuted in both the civil and criminal courts.
>
> **"INVESTIGATION"**. The investigation for any serious violation of said Title 17 USC Copyright Law where the implications are extreme, - DESPITE the fact that maybe only one or two persons are victims - is to take place AUTOMATICALLY by the United States Attorney General's office. It would be sufficient for said investigation to initiate through the United States Copyright Office or/and any appropriate policing agency including, but NOT limited to State, Local, and/or Federal. The RIAA, ASCAP, SESAC and other similar groups would

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ALSO be required to initiate an investigation of such, and demurrer and/or devulge any and all informations to the United States Attorney General concerning any such authorship, plagerism, or/and piracy violations. The era of robbing the poor man of his lyrics must STOP - be they poor Whites, Hispanics, Blacks, Orientals, American Indians or from any OTHER group; and initiating the ensuing lawsuit should NOT be up to individuals who cannot afford a qualified lawyer.

***"PLAGERISM"**, among other commonly known definitions, is the condition of THEFT whereby by a secretary, scribe, recorder, stenographer, or other similar transcriber ascribes to HIMSELF as sole authorship those words, ideas, compositions, or other works which dictating author has entrusted, through the law (common or elsewise), into the hands of the recorder for his safe keeping. Said plagerism of said dictation does NOT constitute any such "fair usage" for the plagerist and/or his assigns, and neither is said dictation within the "public domain". Prosecution for said plagerism would be either within the jurisdiction of the civil or/and criminal court.*

If the foregoing "definitions" are elsewhere described, I appologize; but DO believe that it would be wise to include them within Section 101, due to the apparent confusion that has ensued.

Please reply to the foregoing and allow me to know what you think - I'm sure YOU wouldn't want YOUR words "eaten up" by one of these "Little Gremlins".

Sincerely,
Walter C. Becktel
a_987654321@hotmail.com

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Reed Elsevier, Inc.

VIA ELECTRONIC MAIL

September 5, 2000

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Dear Messrs. Joyner and Feder:

Reed Elsevier Inc. (REI) appreciates the opportunity to offer the following reply comment in response to the Federal Register Notice of 5 June 2000.[1]

I. Introduction and General Comments

Section 104 of the Digital Millennium Copyright Act (DMCA) directs the Register of Copyright, in conjunction with the Assistant Secretary for Communications and Information of the Department of Commerce, to submit a report on two issues: (1) the effects of the amendments made by chapter 12 of the DMCA and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of the Copyright Act, and (2) the relationship between existing and emerging technology on sections 109 and 117 of the Copyright Act. As a publishing and an e-commerce company, the operation of both of these provisions is critically important to our business. REI joins the comments of certain other organizations in saying that no amendment to either section is necessary.[2]

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[1] 65 Fed. Reg. 35673 (June 5, 2000).

[2] These commentators include the Software and Information Industry Association, the American Film Marketing Association, et. al., and Time Warner Inc. As the library associations mentioned (and mischaracterized) our business practices specifically, REI believes it necessary to present its views in further detail.

Reed Elsevier is a world-leading publisher and information provider whose goal is to become an indispensable partner to our customers for information-driven services and solutions in our three areas of focus: Legal, Scientific, and Business Information. Our products include LEXIS-NEXIS, *Variety, Broadcasting and Cable, The Lancet,* and many other print and electronic products in numerous fields of endeavor. REI's Science Direct is the largest web-based service of its kind, containing over 800,000 scientific research articles. In order to continue competing successfully in the marketplace, REI recognizes that it must successfully capitalize on the potential of the Internet.

This year, Reed Elsevier commenced the first phase of a massive strategic investment program. Over the next three years, REI will spend over one billion dollars on a major upgrade of our products and services, the majority of which will be invested in improving the use of Internet technology. E-commerce, and the transmission of copyrighted works over digital networks, forms the core of our business plan for the foreseeable future. Indeed, the advent of the Internet has delivered an ultimatum to many publishers: go online, or go out of business.

Before embarking on this kind of expenditure, REI reviewed the risks of online distribution on such a large scale. Certainly, the DMCA has helped to make computer networks safer—but by no means risk-free—places to distribute copyrighted works.[3] Online piracy of copyrighted works of all stripes still runs rampant. Central to the decision to risk the offering of so many products and services online, however, are what we believe are relatively settled interpretations of sections 109 and 117, ones that have generated reasonable commercial expectations for publishers and consumers alike. Nonetheless, members of the library community and certain other commercial interests argue that both of these sections (and others) require wholesale revision.[4]

In our view, these commentators offer a solution in search of a problem, for several reasons. First, no need for amendment to the law has surfaced. It seems elementary to us that those who would seek a revision to the Copyright Act ought to bear the burden of demonstrating the need for a change to existing law.[5]

The explosive growth in e-commerce and the sale of copyrighted works supports the view that the current versions of sections 109 and 117 have served and are serving the public admirably. The Commerce Department estimates that this year, over 304 million people will use the Internet, and that North America will account for less than half of that usage.[6] Confidence in e-commerce has increased among both the technical *cognoscenti* and the general public.[7] With respect to commerce in copyrighted works, one report estimates that the core copyright industries accounted for over 4.3% of gross domestic product in 1997, and preliminary estimates for 1998 indicate that foreign exports of copyrighted works contributed over $71 billion to our balance of trade.[8] REI therefore views hyperbolic assertions such as "[w]ithout a digital first sale privilege, consumers will not buy in to electronic commerce"[9] as both remarkable and utterly unsustainable.

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[3] The recent public hearings on the effect of section 1201(a)(1)(A), as well as the DeCSS litigation in New York, underscore this point. Nonetheless, as the Copyright Office itself has noted, Congress's work is not yet done, as the copyright law's protection extends only to "original" elements of a work, and leaves labor-intensive works open to wholesale acts of theft. Hearing on H.R. 354, The Collections of Information Antipiracy Act, before the House Subcomm. on Courts and Intellectual Property, March 18, 1999 (statement of Mary Beth Peters) *available online*, www.house.gov/judiciary/106-pete.htm. Action still is needed on legislation to protect databases from misappropriation.

[4] *See, e.g.*, Peter Jaszi, Comments of the Digital Future Coalition (Comment 9), at 1, 4.

[5] *See* S. Rep. No. 101-735, at 7 (1990) (discussing the Computer Software Rental Amendments of 1990 and stating: "Congress has, in the past, resisted proposals to alter the balance achieved in section 109, requiring those seeking amendment to make a compelling case for change."); Michael Remington and Robert Kastenmeier, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 71 Minn. L. Rev. 421, 444 (1985) (""If it ain't broke, don't fix it," is a familiar statement in the halls of Congress.").

Second, many of the comments—in particular those of the library groups—brought forth arguments simply irrelevant to the task before the Copyright Office and the NTIA. Unlike the rulemaking process in section 1201(a)(1)(C) of the Digital Millennium Copyright Act, which allows the Librarian some discretion in determining adverse effects caused by the statute, the text of the study provision in section 104 of the DMCA directs the examination of two specific provisions and gives no comparable discretion. Moreover, as others have noted, Congress narrowed the scope of section 104 during the DMCA enactment process. The libraries' laundry list of complaints about pricing, use restrictions, site restrictions, the inability of staff to interpret contract terms, internet addresses, passwords, and archiving and preservation simply falls beyond the scope of the study.[10]

Other library comments, in addition to being irrelevant, can only be politely characterized as incomplete. The library associations assert that, in an unattributed quote:

> Elsevier has granted electronic access to their journals, but tells us they will only provide access for a 9 month period, so we will lose access to those electronic issues that we once had. We cannot afford their Science Direct product at the moment, which would give us more comprehensive, stable access to their journals.[11]

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[6] Economics and Statistics Administration, U.S. Department of Commerce, Digital Economy 2000 (June 2000) (opening statement of William M. Daley, Secretary of Commerce), *available online*, www.esa.doc.gov/de2k.htm (visited August 26, 2000).

[7] *See id.*

[8] Hearing on the Costs of Internet Piracy for the Music and Software Industries, before the Subcomm. on Int'l Econ. Policy and Trade of the House Comm. On Int'l Relations, 106th Cong. (July 12, 2000) (statement of Q. Todd Dickinson, Director, United States Patent and Trademark Office), *available online*, http://www.ogc.doc.gov/ogc/legreg/testimon/106s/dickinson0719.htm (visited August 26, 2000).

[9] Comment of the Digital Media Association (DiMA) (Comment 22), at 13.

[10] See Comment of the American Library Association et al. (Comment 18), at 6-7 [hereinafter Library Comments]. The libraries are not alone in this, however. *See, e.g.,* Comment of the Digital Future Coalition (Comment 9), at 4 (urging revision of section 301); Comment of the Future of Music Coalition (Comment 24), at 1-2 (discussing the section 114 "webcasting" license); Comments of the Digital Media Association (Comment 21), at 21 (discussing extension of § 110(7) to online retailers).

[11] Library Comments, at 16. Other inaccuracies too numerous to mention appear in the library comments, including a characterization of what the Uniform Computer Information Transactions Act does and does not do.

Missing from this discussion is the fact that Reed Elsevier DOES NOT CHARGE for access to the electronic versions of the most recent nine months of these publications, if the library has purchased a subscription to the print version.[12] REI also permits libraries perpetual access to electronic versions of the journals acquired during the course of the print subscription, but the expense of so doing requires a charge for this service.[13] In short, the libraries' description of REI's business practices, and the "harm" flowing therefrom, is both inaccurate and misleading.

The balance of this reply discusses sections 109 and 117 separately, but follows the same basic format for each discussion. First, it will examine the status of existing law, and the historical impetus underlying each provision. In light of that purpose, it will then examine the main arguments advanced by those who seek the section's amendment. This reply concludes that an amendment to either section is both unnecessary and ill-advised.

II. Section 109

A. Background of the First Sale Doctrine

Section 109's predecessor in the Copyright Act of 1909 was intended to codify the result in *Bobbs-Merrill v. Strauss*.[14] In *Bobbs-Merrill*, the Supreme Court rejected the publisher's argument that the Copyright Law gave the copyright owner power to control the prices of subsequent sales of its books.[15] Because the function of the copyright statute centered around securing the right to *multiply* copies of a work, the Court flatly rejected the publisher's proffered construction as beyond the copyright law's intended purview.[16]

In 1909, Congress codified the result in *Bobbs-Merrill*, and although some debate occurred during the 1976 revision over the precise wording of the legislation, the principle embodied in the decision was not challenged.[17] Section 109 of the current law provides that "notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title … is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[18] The legislative history states that "Section 109(a) *restates* and *confirms* the principle that, where the copyright owner has transferred ownership of a particular copy, the person to whom the copy is transferred is entitled to dispose of it by sale, rental or any other means."[19]

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[12] The libraries are, of course, free to dispose of the printed versions as they wish pursuant to 17 U.S.C. § 109.

[13] Reed Elsevier has also undertaken extensive efforts to ensure that archival copies of these materials are kept. In addition, REI allows libraries to maintain their own archives of acquired material, and will deposit copies of REI publications into appropriate public repositories if our own facilities are dismantled. For more information on our business practices, see Comments of Reed Elsevier Inc. in the rulemaking on the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (March 31, 2000) [hereinafter REI 1201 Comment]. REI is working with libraries every day to develop and improve models of publisher and library co-operation.

[14] 210 U.S. 339 (1908).

[15] *Id.*. at 351. The contract from which the dispute arose also contained this term, but a state court voided it as an unlawful restraint of trade. *See Arguments on Common Law Rights as Applied to Copyright, Before the Copyright Subcomm. of the House Comm. on Patents*, 62 Cong., 2d Sess. (1909), *reprinted in* E. Fulton Brylawski and Abe Goldman, 5 Legislative History of the 1909 Copyright Act, at 36.

[16] 210 U.S. at 350.

[17] *See generally* Stephen W. Feingold, Note, *Parallel Importing Under the Copyright Act of 1976*, 1976, 17 N.Y.U J. Int'l L. @ Pol. 113, 128-32 (1984) (describing the enactments of § 109 in detail).

As Nimmer on Copyright explains, "the policy favoring a copyright monopoly for an author gives way to the policy opposing restraints of trade and alienation."[20] The policy favoring restraints of trade, however, is not unlimited. The first sale of a particular copy does not exhaust the copyright owner's right to control performance, display, the production of derivative works, and reproduction. Moreover, when the exhaustion of the distribution right implicates a threat of substantial unauthorized reproduction, Congress has decided that the policy on free alienation gives way to the policies favoring the encouragement of creativity.[21] This precise policy goal motivated amendments to the Copyright Act prohibiting the unauthorized commercial lease or lending of copies of computer software and sound recordings.[22] In other words, once the reproduction right becomes significantly implicated, the policy against restraints on alienation yields to the goal of protecting against the evisceration of the copyright owner's exclusive rights.

B. Digital Transmissions Implicate Reproduction, Not Alienation

Section 109 has little discernible application to most transactions in the digital world, as digital transmission of a copyrighted work requires the making of a copy on the receiving computer, and therefore involves a reproduction.[23] Some in the library and academic community, as well as certain commercial interests, have argued in this and other fora that the first sale doctrine needs to be altered for the digital age. This argument reared its head when President Clinton formed the Information Infrastructure Task force in 1993, and was resoundingly rejected by that task force two years later:

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[18] 17 U.S.C. § 109(a) (emphasis added). In 1983 and 1990, Congress limited the first sale doctrine right with respect to sound recordings and computer programs. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (Oct. 4 1984); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990).

[19] H.R. Rep. No. 1476, at 79 (1976) (emphasis added).

[20] M. Nimmer and D. Nimmer, Nimmer on Copyright § 8.12[A].

[21] *Cf.* S. Rep. No. 98-162, at 5 (1983) ("Commercial record rentals, to the extent they displace sales, offend the precepts of the Constitution because they deny creators a fair return for the exploitation of their works.").

[22] *See, e.g.*, H.R. Rep. No. 101-735, at 9 (1990) ("Rental of software will, most likely, encourage *unauthorized copying*, deprive copyright owners of a return on investment, and thereby discourage creation of new products."). 17 U.S.C. § 109(b)(1)(A).

[23] The construction urged by the Video Software Dealers Association and the National Association of Recording Merchandisers in pages 13-16 of their comment flies in the face of the plain language of the statute and the overwhelming weight of existing authority. *See, e.g., MAI Sys. Corp. v. Peak Systems, Inc.*, 911 F.2d 511 (9th Cir. 1993) (finding that a copy in RAM is sufficiently fixed to be a reproduction for purposes of the Copyright Act); Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure 90-95 (1995) ("NII Report") (detailing the application of section 109 to a digital transmission). House Judiciary Comm., Section by Section Analysis of H.R. 2281 as Passed by the House of Representatives on August 4, 1998 (Comm. Print) (Ser. No. 6), at 24 ("The first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or dispose of the possession of that copy."). Moreover, reliance on the cases referenced by VSDA and NARM misses the point. For example, in *United States v. Sachs*, 801 F.2d 839 (6th Cir. 1986), and *United States v. Cohen*, 946 F.2d 430 (6th Cir. 1991), the court upheld the defendant's conviction for criminal copyright infringement based on the fact that they had repeatedly

> Some argue that the first sale doctrine should also apply to transmissions, as long as the transmitter deletes from his or her computer the original copy from which the reproduction in the receiving computer is made. ... This zero sum gaming analysis misses the point. ... To apply the first sale doctrine in such a case would vitiate the reproduction right.[24]

Similarly, the 105th Congress took no action on the "simultaneous destruction" proposal contained in H.R. 3048, and the 106th has yet to introduce legislation continuing it.[25] The Task Force's statement remains as true today as it was five years ago, and any such amendment to section 109 would be equally unwise.

First, as discussed above, the existing state of the law serves both publishers and users admirably, and no need for any such amendment has been demonstrated. The enactment of the DMCA represented an important step towards making online networks safe places to distribute copyrighted works. To the extent that chapter 12's effects have been examined by third parties, the parade of horribles predicted by some members of the library and user communities remains pure, unsubstantiated and implausible speculation. Others in the academic community, for example, feared that the DMCA would have a severe effect on encryption research, and as a result Congress required the Copyright Office and the National Information Technology Administration to study the effects of section 1201(g). After the required comment period, the report found that:

> Of the 13 comments received in response to the Copyright Office's and NTIA's solicitation, not one identified a current, discernable impact on encryption research and the development of encryption technology; the adequacy and effectiveness of technological protection for copyrighted

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violated the copyright owner's reproduction rights *with lawful copies that they had already acquired.* In short, the acquisition of a lawful copy under section 109 does not give the transferee the right to make additional reproductions, although fair use and other defenses will excuse certain acts.

[24] *See* NII Report, at 94.

[25] The text of that proposal states:

> The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, [sic] is not an infringement.

H.R. 3048, 105th Cong. (1997).

> works; or protection of copyright owners against the unauthorized access to their encrypted copyrighted works, engendered by Section 1201(g).[26]

Similarly, the recent rulemaking on section 1201 did not reveal any adverse effects flowing or likely to flow from the section's application.[27] It seems incumbent on those seeking to amend section 109 to present more than undifferentiated fears and hyperbolic predictions.[28]

Second, the simultaneous destruction proposal advanced by the Digital Future Coalition renders the copyright owner's right to control reproduction a virtual nullity in practice. Even the willful pirate may escape liability by deleting the originating material from its hard drive, and claiming the benefit of the "simultaneous destruction defense" during litigation. Moreover, it would be impossible for the copyright owner to verify that the transmitting party had actually destroyed the original copy. The problems of proof posed by this language make its adoption ill-advised.

Third, although U.S. law has made significant strides in securing copyrights in digitally distributed works, many countries have not.[29] Further pursuit of a simultaneous destruction proposal may well have adverse international implications. As of 1 January 2000, all members of the World Trade Organization must have domestic laws that structurally comply with the Trade Related Agreement on Intellectual Property Rights (TRIPS). Specifically, article 13 requires each member country to confine its exceptions and limitations on the exercise of enumerated rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the rights of the copyright owner. By substantially eviscerating the reproduction right, the "simultaneous destruction" proposal arguably violates both of these provisions. The United States' ability to foster respect for copyright law abroad will be vastly undercut by eviscerating the copyright owner's ability to control reproduction under domestic law.[30]

Fourth, the adoption of an absolute "digital first sale" in combination with a broad preemption of license terms, as envisioned by the Digital Future Coalition, the libraries, and others undermines the ability of copyright owners to lawfully account for the differing situations of their licenses. Loss of the ability to prevent unauthorized reproduction would cause pricing structures to flatten, hurting most those institutions that rely on inexpensive access to copyrighted works. For example, many libraries and universities acquire inexpensive access to LEXIS NEXIS and Reed Elsevier's Academic Universe at a flat rate or, in the alternative, at cost subject to certain restrictions.[31] REI can offer this service because its contracts ensure that public institutions do not become de facto competitors in the for profit market. If, as the Digital Future Coalition and the libraries seem to envision, this new "digital first sale" would preempt a license term preventing this from occurring, then the small nonprofit library would pay the same price for access to REI's service as a Fortune 50 corporation. REI urges that the NTIA and the Copyright Office consider the benefits of lawful price discrimination[32] when evaluating whatever proposals this process may yield.

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[26] United States Copyright Office and National Telecommunications and Information Administration, Joint Study of Section 1201(g) of the Copyright Act, part VI, *available online*, http://www.loc.gov/copyright/reports/studies/dmca_report.html.

[27] Indeed, the record amassed by the Copyright Office in the 1201 hearings suggests that the increased protection will greatly benefit the market for copyrighted works. *E.g.*, 3 May 2000 Transcript of Anticircumvention Rulemaking, at 17 (noting that the compromise of the content scrambling system (CSS) prevented the launch of sound recordings in the DVD audio format). Similarly, to REI's knowledge, the enactment of the prohibition against falsification, alteration, or removal of copyright management information has had no effect on the first sale doctrine. *See* 17 U.S.C. § 1202 (prohibiting alteration, falsification, or removal of CMI with the *intent* to infringe or aid or facilitate infringement).

[28] Indeed, it seems incumbent on these groups to explain why existing defenses to infringement, such as fair use, do not apply to these transmissions. REI has no opinion in this respect.

[29] *See* Dickinson statement, *supra*. More detailed information on the failure of certain countries such as Brazil, Uruguay, and the Russian Federation to meet international standards can be found at http://www.iipa.com/2000_AUGUST_GSP_PRESS.PDF.

[30] *See generally* Dickinson Statement, *supra* (describing the efforts of the PTO to garner international respect for copyright law).

Finally, we note that some groups have heralded the emergence of so-called "move" technologies,[33] which permit deletion of a copyrighted work simultaneously with its transmission, as the basis justifying adoption of a "simultaneous destruction" statutory amendment. This is analogous to arguing that the potential of anti-lock brakes to make vehicles stop faster justifies abolition of the speed limit. Unauthorized reproduction of all kinds of copyrighted works still runs rampant on the Internet, and it is an open question whether section 1201(a) would prevent circumvention of such technologies in the United States.[34] Though intriguing, these technologies are still in a period of relative infancy; are not in widespread use by copyright owners or users in the U.S., much less abroad; and an open standard for such technologies has yet to surface. Rather than drastically amend section 109 in a manner that requires the copyright owner to rely on a legally untested technologically nascent protection, REI urges the Copyright Office and NTIA to recommend that the market decide whether and how such technologies will be used.

III. Section 117

A. Background

Section 117 emerged from the Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU). After examining the purposes of copyright and finding its application to both the source and object code of computer programs consistent with the act's purposes, it recommended that Congress amend the then-existing copyright law on three fronts. First, it recommended that the Act be amended to include a definition of computer program.[35] Second, it recommended that the possessor of a copy have the right to make an additional copy as an essential step in the utilization of the program in conjunction with a machine and in no other manner. [36]

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[31] *See, e.g.*, REI 1201 comment, *supra* (describing the terms and conditions of access to Academic Universe).

[32] *Cf. USM Corp. v. SBS Technologies*, 816 F.2d 1191 (7th Cir. 1987).

[33] *See, e.g.*, Comment of the Home Recording Rights Coalition (Comment 22), at 5; Comment of the Digital Media Association (Comment 21), at 10.

[34] REI has no opinion as to whether these technologies fall subject to § 1201(a) or 1201(b).

[35] Final Report of the National Commission of New Technological Uses of Copyrighted Works 13 (1978) [hereinafter CONTU Report].

Third, in order to "guard against destruction or damage by mechanical or electrical failure,"[37] it recommended that the possessor have the right to make a backup copy, and destroy it when possession of the original ceases to be rightful.[38] Congress adopted section 117 almost verbatim from the CONTU report; the sole change involved striking the phrase "rightful possessor" and requiring the privilege to be used by an "owner."[39] At the time section 117 became law, this exception was of much greater importance. Most computers of the day ran on 5 1/4" floppy disks, which are extremely fragile and degrade quickly. If those disks became damaged, the computer would cease to function. Modern digital media lasts much longer, with minimum risk of degradation if properly stored.

B. Section 117 Applies to Computer Programs Only

Much misunderstanding about section 117 seems to exist, in particular with respect to the right to make a backup copy. First, the exemption extends only to the owners of copies of computer programs. It does not apply to every kind of work fixed in digital media. REI is aware of no "trend" (much less a case) supporting this proposition, the statements of the Digital Media Association notwithstanding. The Digital Media Association cites *DSC Communications v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997), for the assertion that the trend is to read section 117 broadly.[40] In that case, the District court dismissed several claims of infringement against the defendant based on the unauthorized reproduction of software. What the Digital Media Association neglects to point out, however, is that *the District Court was reversed on every claim relating to copyright infringement, including its construction of 117. See DSC Communications v. Pulse Communications., Inc.*, 170 F.3d 1354,1362, 1364 (5th Cir. 1999).[41]

In light of the lack of any support for this proposition in current law, REI opposes the blanket extension of section 117 beyond computer programs to temporary copies of any work. First, such a provision is unnecessary if the reproduction of the work is authorized, the infringement is de minimis, or the infringement may be excused as fair use as in the case of a lawfully made CD, DVD, or digital download of copyrighted material. As the library associations, Digital Media Association, the Home Recording Rights Coalition, and the Digital Future Coalition support the addition of this amendment, REI believes that they should compellingly demonstrate to the Copyright Office and the NTIA why (1) existing defenses, including fair use, would not apply in these contexts; and (2) that leaving § 117 in its current form would seriously inhibit important uses of these works.[42]

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[36] *Id.* at 12.

[37] *Id.* at 13.

[38] *See id.* at 12.

[39] *Compare id.* at 12 with 17 U.S.C. § 117(a).

[40] Comment of the Digital Media Association (Comment 21), at 15 n.18.

[41] The confusion does not stop there, however. The Computer and Communications Industry Association believes that 117 can require software to be maintained by the copyright owner's service organization. Comment of the Computer and Communications Industry Association (Comment 19), at 2. As amended in 1998, the text of 117 provides exactly the opposite. *See* 17 U.S.C. 117(b). Moreover, attempts to improperly extend the copyright monopoly beyond the scope of the rights in § 106 fall subject to claims of misuse. *See, e.g., Lasercomb, supra. See, e.g., Lasercomb Am., Inc. v. Reynolds,* 911 F.2d 970 (4th Cir. 1990). Of course the circumstances under which a misuse claim may arise have nothing whatsoever to do with section 117, and are beyond the scope of the study.

Second, many (though certainly not all) of the works published by Reed Elsevier are factual compilations, containing only thin copyright protection. Copyright does not protect the massive investment required to create these works in the labor required to ensure their thoroughness, accuracy, currency and ease of use; and this leaves these works vulnerable to acts of piracy. Any blanket exemption of temporary copying would enable a would-be "competitor" to strip valuable material out of the underlying database, and offer a competing product at a fraction of the cost of the original. This is particularly so in the Internet environment, which lends itself to costless and immediate manipulation.. One district court has already (REI believes erroneously) found this kind of activity non-infringing under existing law.[43] Statutorily exempting this kind of copying renders an anorexic copyright nonexistent.

V. Conclusion

The long series of events leading up to the DMCA's enactment relied on certain settled interpretations of existing law. REI, along with many of the other groups that have submitted comments on this provision and in the 1201(a)(1) rulemaking, believes that the statute and the compromises reflected in its provisions should be given a chance to work as intended—in conjunction with existing rights, remedies, and defenses. Changes in technology will pose new challenges to the Copyright Act, and create new markets for copyrighted works; indeed, technological change drove the enactment of the DMCA. Many of the policy arguments of the user community relating to the amendment of sections 109 and 117 were made during the course of the DMCA's consideration by Congress. In the wake of a statutory revision involving the balance of many competing policies, the wiser course of action is to allow the market's evolution through private adjustment and judicial interpretation. REI believes—and the balance of experience suggests—that e-commerce will continue to flourish as a result, producing a variety of products and business models to the benefit of the public.

What does harm e-commerce, however, is epidemic and unchecked piracy of copyrighted works. The groups that submitted comments may not like existing law, but they do respect it. There is, however a class of users that believes copyrighted works become "free" by mere virtue of their placement in digital media. REI urges that NTIA and the Copyright Office should use the opportunity presented by this study to "contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing."[44]

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[42] The Home Recording Rights Coalition states that is fair use. *See* Comment of the Home Recording Rights Coalition, at 6. REI has no opinion on whether such acts are lawful.

[43] *Ticketmaster v. Tickets.com*, (CV 99-7654 HLH (BQRx)) (C.D. Cal.) (August 10, 2000) (unpublished opinion), *available online*, www.gigalaw.com.

Should the Copyright Office and NTIA deem it necessary to hold hearings on this matter, Reed Elsevier would welcome the opportunity to present its views.

Respectfully submitted,

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[44] *Universal Studios, Inc. v. Remeirdes*, 2000 U.S. Dist. LEXIS 11696, at *144 (S.D.N.Y. 2000).

**American Film Marketing Association,
Association of American Publishers,
Business Software Alliance,
Interactive Digital Software Association,
Motion Picture Association of America,
National Music Publishers' Association, and
Recording Industry Association of America**

VIA ELECTRONIC MAIL

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September 5, 2000

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RE: Joint Reply Comments of Copyright Industry Organizations
Report to Congress Pursuant to Section 104 of the Digital
Millennium Copyright Act
65 Fed. Reg. 35673 (June 5, 2000)

Dear Messrs. Feder and Joyner:

The undersigned copyright industry organizations appreciate this opportunity to submit joint reply comments in this proceeding.

I. Section 109

While many of the initial submissions, such as those of the Software and Information Industry Association (SIIA) (#12) and Time Warner Inc. (#29), support the position taken by our initial comments that section 109 should not be changed, others take a contrary view. The numerical majority of submissions concentrate their fire on the anti-circumvention and copyright management provisions contained in chapter 12 of Title 17, as added by the Digital Millennium Copyright Act (DMCA), and make only passing reference -- or none at all – to section 109. Since this is a study, not a rulemaking proceeding, it would not be fully accurate to say that these submissions fall outside the scope of this task at hand; but we do think they say little that has not already been said, sometimes by the same commenters, in the pending rulemaking proceeding under 17 USC section 1201(a). Consequently there is no need to respond to the same arguments again in this reply round.

The other comments addressed to section 109 fall into three main categories. First, some submitters, notably the Digital Future Coalition (DFC) (#9), Home Recording Rights Coalition (HRRC) (#22), and (seemingly) the Digital Media Association (DiMA) (#21), urge the Copyright Office and the NTIA to recommend to Congress that it adopt the amendments to section 109 that it repeatedly rejected just two years ago. Second, the submission of the National Association of Recording Merchandisers (NARM) and the Video Software Dealers Association (VSDA)(#27) stresses the extent to which the first sale doctrine already applies to certain kinds of digital distribution of copyrighted materials, and focuses on licensing controls and technological measures that affect the transferability of copies or phonorecords. Finally, the comments of the American Library Association et al (Library Associations) (#18) offer a number of general recommendations about "a first sale doctrine for the 'digital millennium'."

Before responding specifically to these comments, it is worth reviewing some of the key characteristics of the first sale doctrine. The Time Warner comments provide the pithiest summary: "it is a doctrine that distinguishes possessory personal property rights from copyrights." Time Warner at 1. Both under judicial precedent, and as codified in section 109, the first sale doctrine provides an exception to only one of the exclusive rights of copyright owners: the distribution right. It allows the distribution, without the authorization of the copyright owner, of a lawfully made copy or phonorecord that the distributor owns. It does nothing else other than to legitimize this act of distribution of a physical copy, which would otherwise infringe on the copyright owner's exclusive distribution right. In particular, it does not alter the axiomatic principle codified in section 202 of the Copyright Act: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object … does not in itself convey any rights in the copyrighted work embodied in the object…". 17 USC 202.

The proposals to amend section 109 that are discussed below do not merely "update" or "reaffirm" the first sale doctrine. Nor do they simply "extend" that doctrine to a new technological environment. The first sale doctrine continues to apply whenever the circumstances in which it operates are present: someone who owns a physical object, lawfully made, in which a copyrighted work is embodied, wishes to "sell or otherwise dispose of the possession of" that object. The proposals discussed below apply in wholly different circumstances, and would do something quite distinct from and more drastic than what the first sale doctrine does. They consist of completely new limitations upon the exclusive rights of copyright owners other than the distribution right (the only right which the first sale doctrine limits). In particular, they undermine the exclusive reproduction right, the fundamental cornerstone of the edifice of copyright protection. We urge the Copyright Office and the NTIA to review these proposals in this light, rather than as mere "updates" or "extensions" of first sale. They are no such thing.

A. Revival of the Boucher Amendment to Section 109

For several years, dating back at least to the time of the Clinton Administration Green Paper of 1994, some have argued that the first sale doctrine should be used as a launching pad for additional limitations on exclusive rights in the digital environment. The owner of a digital copy, they assert, should have the privilege of making another digital copy, and of transferring that copy, without the permission of the copyright owner, so long as the first digital copy is simultaneously destroyed (the so-called "forward-and-delete" scenario). As we pointed out in our initial comments, this proposal (which was embodied in amendments to section 109 proposed in 1997-98 by Representative Boucher, among others, and in a provision of H.R. 3048 in the 105th Congress) has been consistently rejected, both in the White Paper and by Congress.

The DFC, HRRC, and DiMA submissions try to breathe new life into this moribund argument by pointing to the rapid progress in digital rights management (DRM) technology. A fundamental objection to the proposal to extend the mantle of the first sale exception to cover "forward and delete" transactions has been its inherent unenforceability. Determining whether, in each instance, the original has been "erase[d] or destroy[ed] … at substantially the same time" as the transmission of a copy is a daunting task. According to these submissions, technology has ridden to the rescue. As HRRC puts it, "whatever the situation in 1998, the technology to secure the first sale privilege exists today." (HRRC, at 5.) DRM systems allow copyright owners to use "encryption, authentication and password protection" to ensure that the original (from which the transferred copy is made) is deleted or at least made inaccessible, "such as by permanently transferring with the content the only copy of the decryption key." Id. NARM/VSDA seems to have similar technology in mind when it argues that first sale "should be expanded to apply to … 'move technology' [or] a 'check-in/check-out' process." NARM/VSDA at 38-39.

While superficially attractive, this argument does not bear close scrutiny as a justification for a broad expansion of section 109 at this time. At least five significant problems come to mind.

First, while it is no doubt true that DRM technology has become both more widespread and more reliable than it was in 1998, it is not yet so ubiquitous and so secure that it can provide the foundation for the substantial diminution of the reproduction right which the H.R. 3048 language represents. Whether this technology ever achieves that status is a decision that will turn on future developments in the marketplace. Today, for example, there are many potential e-commerce applications for the mass market in which the use of robust DRM technology is economically infeasible: it is simply still too expensive. Unless and until that changes, business models based on a "forward and delete" system are not likely to flourish, much less to become so widespread as to justify a fundamental change in copyright law.

Second, while proponents of the H.R. 3048 language now point to DRM technology to justify it, they argue that the first sale exception should be dramatically expanded even in situations in which such technologies are not in use. Even DiMA, the most articulate and nuanced advocate of the view that DRM technology provides the silver bullet for expanding section 109, refuses in the end to pull the trigger of linking the expanded exception to the use of such technologies: "Any extension of the first sale doctrine cannot apply only to content protected using DRM tools." DiMA, at 12 (emphasis added). Where these tools are not in place, apparently, DiMA would fall back on the discredited "honor system" for determining whether the original of a forwarded digital copy was, in fact, simultaneously deleted. This approach is no more practical – and from the viewpoint of protecting the legitimate markets for copyrighted materials, no more palatable – today than it was two years ago or five years ago, when it was rejected by Congress and by the Administration in the White Paper, respectively.

Third, even if an expanded section 109 exception were to apply only to copies or phonorecords to which DRM tools had been applied, it is virtually certain that some users would seek to disable those tools in order to carry out broader unauthorized distribution than the "forward and delete" model contemplates. Advocates of reviving the H.R. 3048 approach seem to disagree about how to handle this problem.

As the capsule description of DRM technologies in the HRRC filing suggests, and as the more detailed treatment of them in the DiMA filing makes explicit, the technologies upon which these submitters rely to justify a drastic expansion of the section 109 exception "may constitute access controls subject to the provisions of section 1201(a)." DiMA at 8. It is more than a bit ironic, then, that some of the most vociferous advocates of reviving the H.R. 3048 amendment to section 109 argue, at the same time but in a different proceeding, that the authorized possessors of digital copies or phonorecords ought to remain free to circumvent precisely these same technologies without any legal consequences. See, e.g. Oral Testimony on behalf of DFC by Professor Jaszi in Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, Copyright Office Docket No. RM 99-7, May 2, 2000 (it should remain legal to circumvent access controls applied to "works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof.") While the immunity from liability they have advocated in the section 1201(a) rulemaking proceeding would apply only if the uses made of the work after circumvention of DRM technologies is "lawful" or "non-infringing," this provides little comfort. The ongoing Napster litigation amply demonstrates the apparently widely held (but, we believe, clearly mistaken) view that massive unauthorized distribution of copyrighted material is just such a "lawful" or "non-infringing" use. Indeed, DFC's own counsel has been quoted in the press as saying "I think it is an open question as to whether one person sending a music file to another person in a noncommercial situation is fair use." Rodger, "Music-copying laws often shield consumers," http://www.usatoday.com/life/cyber/tech/cti351.htm (posted at USAtoday.com site 8/10/00). Of course, if the correct answer to that question were "yes" (and we do not believe it is), then under the DFC approach the DRM tools cannot be relied upon to ensure the integrity of the "forward-and-delete" scenario, since, in their view, it should be perfectly legal to circumvent them.

Advocates of the H.R. 3048 language are fundamentally in conflict with each other in their approach to access control measures (such as DRM tools) that are operative after a user has obtained authorized possession of a copy or phonorecord. DiMA recognizes that "DRM tools will fuel new business models (such as subscription or on-demand listening, 'try before you buy,' rental or downloading of promotional recordings that will 'time-out' after a specified period) in which first sale privileges should not apply," and characterizes these models as "pro-content-owner/pro-consumer opportunities." DiMA at 9. DFC, by contrast, is concerned that exactly the same access control measures "have the potential to erase any remaining vestiges of 'first sale' in current law." DFC, at 2. Additionally, other submitters argue that the protections provided by section 1201 should be completely unavailable for "arbitrary" technological measures that "impair" the ability of owners of lawfully made copies or phonorecords to distribute them as section 109 contemplates. NARM/VSDA at 37-38. Until there is consensus on the legal consequences for circumventing DRM tools (or for trafficking in the means to do so), it is difficult to consider seriously an expansion of the section 109 exception that relies upon the integrity and strength of those tools.

Fourth, the scope of the exception proposed in H.R. 3048 and revived in these comments is actually much broader than the "forward-and delete" model implies. As noted above, the first sale doctrine as we have come to know it over the past century is an exception only to the exclusive right to distribute a copy or phonorecord; it does not provide any exception to the exclusive rights of reproduction, public performance, or public display. Even if it were justified to immunize, under some circumstances, unauthorized reproduction to the extent necessary for a distribution of a copy or phonorecord, that justification would not extend to the rights of public performance or display, which have never been limited by the first sale doctrine. Yet the H.R. 3048 language would deny the copyright owner any control over the reproduction needed to carry out an unauthorized performance or display, even though these activities (unlike an unauthorized distribution) could not plausibly be characterized as ever coming within the first sale doctrine. We must assume as well that the advocates of this approach believe (although the language they support does not explicitly say so) that the public performance or display which is enabled by the (immunized) reproduction should also be free from the control of the copyright owner. Thus, the H.R. 3048 language threatens to undermine not just one, but four, of the five exclusive rights that copyright owners have historically enjoyed.

Finally, perhaps the most cogent argument against reviving the H.R. 3048 expansion of section 109 is DiMA's candid admission that "the absence of the first sale privilege has not had a chance to affect consumers [and] has not been felt in the marketplace." DiMA at 13. DiMA's prediction that "consumers will become dissatisfied with ecommerce if they cannot trade or sell via transmission the works they acquire digitally," id., is simply that – a prediction. It ignores the flexibility that licensing arrangements can provide to allow such trading or selling under certain circumstances without tampering with the statutory first sale doctrine. And it certainly does not yet provide a sufficient basis for dramatically altering long-established copyright principles, using the first sale doctrine as a launching pad, as the proposed amendment to section 109 would do.

The copyright industry organizations joining in this submission agree that technological developments, including DRM tools, will significantly affect the environment within which the first sale doctrine – as well as the rest of the Copyright Act – is operative. These tools are at a relatively early stage of development today. We cannot rule out the possibility that the further development of these technologies will, at some point in the future, justify changes to section 109 that can advance the mutually supportive goals of providing adequate incentives for creativity and innovation, and promoting electronic commerce and other digital dissemination of works of authorship. But clearly such changes are not justified at this time.

2. Application of current section 109 to licensing and technological controls

The NARM/VSDA submission stresses a valid point that is sometimes overlooked or misunderstood: the first sale doctrine, as codified in section 109, continues to play an important role, including in the distribution of copyrighted materials in digital formats. We agree with NARM/VSDA, for example, that "the owner of a lawfully made copy or phonorecord is the owner regardless of whether the copy was purchased or, after the purchase of a blank medium, lawfully 'made' by exercising a license to make a copy," NARM/VSDA at 12. The owner of such a copy or phonorecord, which could include someone who makes it via an authorized digital download to his home or to a retail location, remains free (by virtue of the first sale doctrine) "to sell it to the highest bidder, loan it, trade it, or give it away, and the copyright owner is not authorized – under the Copyright Act – to prevent it," id. at 14, although contractual or other non-copyright restrictions may apply.

These statements, which we read as applying only to the transfer of the physical copy that was lawfully made in the first place, and in the absence of licensing or technological restrictions to the contrary, offer a healthy corrective to those who assert that digital technology has reduced the first sale doctrine to mere "vestiges" of its former self. See DFC at 2. See also Time Warner at 1 ("Thus properly understood, the first sale doctrine applies not only to traditional media in which works are fixed, but also to tangible digital media.") We part company with NARM and VSDA, however, when they argue that the transferees of copies or phonorecords in digital formats should be free to ignore contractual or licensing restrictions on further redistribution of these materials, or that technological measures employed by copyright owners should be stripped of all legal protections if they have an impact on such redistribution.

The voluminous NARM/VSDA submission offers no cogent reason why a contract or license should not be enforced simply because it restricts the redistribution right that the transferee would otherwise enjoy under section 109. Indeed, to the extent that the terms of a transfer include redistribution restrictions, it may well be that the transfer does not constitute a sale, the transferee is not the owner of the copy in question, and the first sale doctrine is completely inapplicable. See, e.g., Adobe Systems Inc. v. One Stop Micro Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000). NARM and VSDA apparently believe that business models that include redistribution restrictions are unconstitutional. See NARM/VSDA at 26-28. However, their analysis, which inflates the right of further distribution in accordance with section 109 to the exalted status of a First Amendment absolute, cannot withstand serious scrutiny. (With their attempt to equate this widespread business model with racial or religious restrictive covenants, these submitters step from the implausible to the offensive. See id. at 27 n.12.). It is hard to understand how the interests of consumers could possibly be served by shutting down particular e-commerce business models because of the particular status and perquisites they offer to the recipients of digital copyrighted products.

Our disagreement with the NARM/VSDA recommendations concerning technological protection measures stems from what we referred to in our initial comments as the crucial distinction between (1) the physical possession and ownership of a tangible object embodying a copy of a copyrighted work, and (2) the authorization to access or make specified uses of that work. The first sale doctrine addresses the former, not the latter; but generally it is only the latter which is the subject matter of technological measures protected by section 1201(a). The NARM/VSDA submission does not ignore this distinction; instead, it attacks and seeks to obliterate it. See id. at 35-36. Its unrelieved hostility to allowing the copyright owner to set "any limit on how many times or for how many days a song may be listened to or a movie watched, or to limit the number of people to whom it may be lent or to whom it may be given," id. at 28, extends to the use of technological measures to implement such limits. Yet, as the copyright industry organizations have argued in other contexts (see, e.g., Joint Reply Comments of AFMA et al in Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, Copyright Office Docket No. RM 99-7, March 31, 2000, at 22), and as other submitters in this proceeding acknowledge, such measures "fuel new business models," DiMA at 9, and promote increased dissemination of copyrighted materials. Thus, NARM/VSDA's proposal -- to exclude from protection under section 1201 all access control technologies that "impair the rights of the owner of a copy or phonorecord lawfully made under this title as set forth in section 109", NARM/VSDA at 38 – would be both misdirected (virtually no such technologies impair those rights as they are properly understood) and counter-productive to the healthy development of electronic commerce.

3. The first sale doctrine for the digital millennium

The list of recommendations which conclude the submission by the library associations raise a number of interesting points, but their relationship with section 109 is not always clear. For example, the asserted problems with interlibrary loan (ILL) of materials in digital formats, Library Associations at 11-13, appear to be licensing issues, as are the concerns about receipt of donations (see id. at 18-19) and limitations on the number or location of authorized users (id. at 17-18). If in each of these instances the library (or in the case of donations, the would-be donor) is a licensee of the copy in question, not an "owner," then section 109 by its terms does not apply. Furthermore, to return to the ILL comments, it is not clear whether what the libraries are seeking is the ability to loan a tangible copy (e.g., an optical disk) in which the copyrighted material is embodied, or whether they seek to make digital transmissions of material to other libraries. Only the first scenario implicates the first sale doctrine as it currently exists; the second involves the making of a copy in the course of transmission, evidently without any simultaneous erasure of the original, and thus would not be accommodated even by the expanded section 109 advocated in H.R. 3048. Similarly, concerns about archiving and preservation, see id. at 14-17, while undoubtedly important, do not appear to raise issues under the first sale doctrine. The pre-emption issue raised by the Library Associations, see id. at 23, will be discussed below.

In summary, our review of these comments does not change our view that section 109 of the Copyright Act should not be amended. To do so would neither facilitate the growth of electronic commerce, nor promote the development of new technologies for creating, disseminating and using copyrighted materials.

II. Section 117

A. Incidental copying

As with section 109, a number of submitters (including CCIA, HRRC and DFC) took a "back to the future" approach to section 117, calling for enactment of an amendment proposed during the 105th Congress but not accepted as part of the DMCA. (Another submitter (DiMA) advocates a similar amendment but with somewhat different phrasing ["to exempt the loading of all types of digital content into memory, as an essential step in accessing the content"]. DiMA at 19.) The "incidental copying" amendment advocated by these submitters is not justified by technological developments and would not promote the healthy growth of electronic commerce. Instead, it would dramatically expand the scope of section 117 and drastically cut back on the exclusive reproduction right in all works.

Most of these submissions proceed from the premise that existing section 117 has been "in essence … repealed," CCIA at 2, by decisions such as MAI Systems Corp. v.

Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994). See DFC at 3 (Congress needs to "restore the vitality" of section 117 after MAI). In our view, this premise is false. The MAI decision stands for two propositions relevant to section 117, both of which buttress, rather than weaken or "repeal," that statutory provision and the objectives for which it was enacted.

The central holding of MAI is its reaffirmation that copies of computer programs made in the memory of a computer – in that case, temporary copies made in Random Access Memory (RAM) -- are reproductions that fall within the scope of the exclusive reproduction right of the Copyright Act. MAI, 991 F.2d at 518-19. This holding is consistent with the White Paper's statement, made in 1995, that "it has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material." White Paper, at 64. It also echoes the conclusion of CONTU in 1978: "the introduction of a work into a computer memory would, consistent with the [current] law, be a reproduction of the work, one of the exclusive rights of the copyright proprietor." CONTU Final Report, at 40. (As we noted in our initial comments, CONTU's report formed the basis for section 117.) The same holding has since been reaffirmed in a number of other federal court decisions. See, e.g., Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995), *cert.denied*, 116 S. Ct 1015 (1996); Stenograph L.L.C. v. Bossard Associates, Inc., 144 F.3d 96 (D.C. Cir. 1998).

Thus, there is no merit to the suggestion that this aspect of the MAI decision "is on questionable footing," CCIA at 2, or that it "suggest[s] that the use of computer programs by purchasers may now be legally constrained in ways that the Congress did not anticipate in 1980," DFC at 3, when section 117 was enacted. The opposite is true: if, contra the holding in MAI, such copying of a computer program into memory were not a reproduction falling within the scope of the reproduction right, enactment of what is now section 117(a)(1) would hardly have been necessary.

A second holding in MAI simply restricted the benefit of the section 117 exceptions to the sole party designated by Congress to enjoy it: "the owner of a copy of a computer program," as distinguished from a licensee. MAI, 991 F.2d at 519 n. 5. This holding, too, buttressed section 117 as Congress passed it.

Two years ago, the proponents of H.R. 3048 called upon Congress to overturn these holdings of MAI v. Peak by adopting the "incidental copying" exception which HRRC and DFC now seek to revive. Congress not only spurned this suggestion; it drew the opposite conclusion, and passed legislation endorsing and reaffirming the principles consistently espoused by CONTU, by the White Paper, and by the courts in MAI and its progeny.

Title III of the DMCA added a new section 117[c] that spells out the specific and limited circumstances under which the reproduction of a computer program in memory for the purpose of computer maintenance or repair is not an infringement of the reproduction right. As explained by the House Judiciary Committee (in which this provision originated), this amendment had "the narrow and specific intent of relieving independent service providers … from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made." H. Rpt. 105-551 (Pt. I), at 27. In so doing, Congress clearly endorsed both the holdings of MAI summarized above, since otherwise there would have been no need to relieve independent service operators of liability for making unauthorized reproductions of computer programs of which they were not the owners. In the DMCA, Congress embraced the general principle that temporary copies in RAM are copies that are subject to the copyright owner's exclusive reproduction right, and made only those carefully calibrated adjustments to the principle necessary to address the problems experienced by independent providers of computer maintenance and repair services.

Interestingly, none of the submitters have virtually anything to say about the change to section 117 made by Title III of the DMCA. Instead, these submitters employ section 117 as a convenient starting point for a much more comprehensive attack on the exclusive reproduction right. They resurrect a proposal that, unlike the existing section 117, undercuts the reproduction right in all works, not just computer programs; that applies to copies made in any kind of "device," not just in a computer; and that purports to solve a "problem" whose seriousness has never been demonstrated and that is, in any case, already adequately addressed by other provisions of the DMCA.

Three years ago, when this proposal was first presented to Congress, its supporters argued that it was necessary in order to prevent an impending collision between copyright law and the growth of the Internet and electronic commerce. Today, these submitters recycle similar arguments. They conjure up supposed impediments to the roll out of a panoply of new consumer electronic products (see DiMA at 19), or claim that current law creates a "theoretical illegality of virtually all Internet transmissions [that] has imposed serious barriers on the growth of the Internet." CCIA at 3. Based on the experience of the past few years --- including the continued explosive growth of all aspects of the Internet and the coming to market of a wide range of innovative computing and consumer electronics products --- the Copyright Office and NTIA should receive these urgent yet strangely familiar warning cries with a considerable degree of skepticism.

One reason why there has been so little overt legal conflict over incidental copying – the supposedly intractable problem which the H.R. 3048 amendment to section 117 is purportedly intended to solve -- is that Congress, in enacting the DMCA, addressed and dealt with some of the potential flash points. For instance, it did so in Title II of the DMCA (now section 512 of the Copyright Act), not by tearing big new loopholes in exclusive rights, but by carefully fashioning limitations on remedies that apply to infringements – including notably "incidental copying" –that may occur in the course of activities that are essential to the smooth functioning of the Internet, such as linking, storing, caching, or providing conduit services. While to a considerable extent these provisions simply codify pre-DMCA practice, they also provide a road map that content owners and service providers alike may consult to seek to avoid unnecessary legal conflicts and to continue on a cooperative track.

It is thus somewhat surprising to see CCIA condemning "the lengthy and costly negotiations" leading up to these provisions, and complaining that compliance with them has taken precedence over "deploying the most technologically efficient solutions." CCIA at 3. (Our surprise is heightened by the fact that just three weeks later, CCIA filed an amicus brief in the Napster case claiming that "section 512 provides a layer of liability protection to service providers *in addition to* copyright infringement defenses applicable prior to the DMCA." See Amicus Brief of Ad Hoc Copyright Coalition et al in Napster, Inc. v. A&M Records, Inc., Nos. 00-16401 and 00-16403 (9th Cir., filed August 25, 2000), at 12 (emphasis in original).) CCIA appears to assume that any steps that service providers take to meet the prerequisites for the remedy limitations in Title II of the DMCA – for instance, to exclude repeat copyright infringers from participation, 17 USC 512(i)(1)(A) -- constitute waste and inefficiency. The basis for that assumption is far from self-evident. In any case, if service providers wish to avoid expending whatever resources may be needed to meet these prerequisites, they are free to do so. Not a single one of these "complex legal requirements" is mandatory on any party doing business over the Internet, and failure to meet them does not even prejudice any defense to infringement that a service provider may wish to offer. 17 USC 512(l).

In short, the proposed "incidental copying" exception remains a drastic (in practical terms) solution in search of something more than a largely theoretical problem. The submissions provide no basis for recommending a weakening of the well-established exclusive reproduction right enjoyed by the owners of copyright in all categories of works, regardless of whether such a weakening provision is put forward as an amendment to section 117. To the contrary, adoption of such an exception would threaten to disrupt the emerging e-commerce marketplace and to leave it significantly more vulnerable to piracy.

There is no question that in this emerging marketplace, digital temporary copies are an increasingly important means through which copyrighted works are legitimately made available to the public. Access to works via local area networks, as well as via the Internet, or through the use of "network-ready devices" that do nothing more than connect to a network and use works temporarily online, all exemplify this trend. By the same token, the most prevalent and virulent forms of piracy in the digital networked environment will also consist of nothing more than making temporary digital copies available, without authorization, to members of the public. If the Copyright Act were amended to amputate from the exclusive reproduction right – the fundamental right of copyright owners -- the right to control the making of "temporary" or "incidental" copies, the door for pirates to the digital marketplace would be propped wide open, and the ability of copyright owners to combat network-based piracy would be severely impaired.

B. Archival/back-up copying

Section 117(a)(2), which allows the owner of a copy of a computer program to make an archival copy of it without the permission of the copyright owner under certain conditions, is a narrow exception to the exclusive reproduction right. Under no circumstances does section 117(a)(2) allow the creation of "back-up copies" of works such as sound recordings, music, audio-visual works, or databases. As at least two initial round submitters have pointed out, many pirates and distributors of pirate software products have actively disseminated misleading statements about this provision in order to give their operations a false air of legitimacy, see Interactive Digital Software Association at 5-6; SIIA at 3-4.

At least two other submitters – HRRC and DiMA – call for the Copyright Office and NTIA to recommend an expansion of the archival copying exception in section 117(a)(2), to cover any "content that [consumers] lawfully acquire through digital downloading," HRRC at 6, DiMA at 15. While we do not suggest that these two organizations have succumbed to the campaign of disinformation that has may have misled many Internet users into believing that the archival copying exception already applies to all works, their recommendation, if adopted, could certainly have a similarly deleterious effect. We urge the Copyright Office and NTIA not to recommend such a change.

III. Other Issues: Pre-Emption and Section 1201

Several submitters suggested additional amendments to Title 17 beyond the two sections which Congress mandated as the focus of this study. We will comment briefly on two of these suggestions.

First, we oppose the proposals by DFC and the Library Associations for federal legislation pre-empting and/or setting "minimum standards" for the terms of licensing agreements governing transactions in copyrighted materials. See DFC at 4, Library Associations at 18, 23. The electronic commerce marketplace in works of authorship, while growing rapidly, is still at an embryonic stage; to subject it to such intrusive federal intervention at this time would be exceptionally imprudent. There is simply no evidence of a real and widespread problem with copyright licensing terms that can only be solved by federal pre-emption. On such a record, the agencies should certainly refrain from recommending any such legislation. Instead, participants in electronic commerce should retain the ability to resolve licensing and contractual issues in the marketplace, and to have the terms of their agreements enforced in conformity with applicable state contract law, including (as states adopt it) the proposed Uniform Computer Information Transactions Act (UCITA).

Second, we also question the wisdom of the proposals put forward by DFC (at 4) and NARM/VSDA (at 37-38) to carve out new loopholes in 17 USC 1201. The anti-circumvention provisions of the DMCA, which have not even fully taken effect yet, provide essential legal back-up for key enabling technologies for electronic commerce. There is no factual basis upon which to reverse the decision Congress made less than two years ago, and to deny copyright owners the right to choose to deploy such technologies, as DFC calls for. Our disagreement with the NARM/VSDA proposal regarding section 1201 is explained in more detail above (see p. 7 supra).

* * * *

If any of the undersigned organizations can provide further information or answer any questions concerning these reply comments, please do not hesitate to contact us. Thank you in advance for your consideration of our views.

Respectfully submitted,

AMERICAN FILM MARKETING ASSOCIATION

ASSOCIATION OF AMERICAN PUBLISHERS

BUSINESS SOFTWARE ALLIANCE

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION

MOTION PICTURE ASSOCIATION OF AMERICA

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

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Regarding Docket No. 000522150-0150-01:

This reply comment is written in reply to those submissions which erroneously claim that the first sale doctrine only confers a right to transfer a copy. For example Mr. Sorkin's comments in his capacity as senior counsel for Time Warner, Inc. includes the claim (Page 1, ¶ 2) that,

> The first sale doctrine, in its origin and in its current statutory existence, has as its underlying purpose the prevention of using the Copyright Law to impose price or other conditions on the ability of the owner of a copy of a work to dispose of that copy. The first sale doctrine does so in very simple and clear terms: it provides an exception to the right of distribution granted in Section 106(3). It provides no other exception to the rights granted by Section 106.

Mr. Sorkin's comment is incorrect because it ignores the existence of § 109(c) of the Copyright Act,

> Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

Clearly the scope and purpose of the first sale doctrine is larger than Mr. Sorkin would have us believe. There has traditionally been a right to *use* a work for which one owns a lawfully-acquired copy. The re-sale of a legitimate copy that Mr. Sorkin mentions clearly depends on a right to view, read or make other ordinary use of a work. The resale value of a DVD disk is not a reflection of a DVD disk's value as a polycarbonate drinks coaster, nor in the case of a paper book is the resale value a reflection of a book's value as a ream of writing paper. The future *use* of the work embodied in the copy principally accounts for the resale value of the copy. If the first sale doctrine is to survive in any meaningful form, the impact of technological protection measures on the right to make ordinary use of a lawfully-acquired work must be addressed (ordinary use was a right prior to the enactment of § 1201).

Mr. Sorkin's suggestion that there are those who would attach a right to make copies to the first sale doctrine is a mis-direction.[1] The real issue is whether *after* having authorized a copy for display on a computer, the copyright owner has the right to require that the extant copy in the computer's random-access memory (RAM) be *destroyed.*[2] Mr. Sorkin is conjuring the image of a television or a radio with his mention of "transmission." The issue of whether or not a *persistent* copy is generated by viewing a work is not properly understood as a result of how a work is distributed. Persistence is a property of the device that receives the transmission. "Transmission" is really a synonym for distributing a work without the *transfer* of a copy. It refers to the distribution of a work by the *creation* of a new copy in the receiving device. Mr. Sorkin seeks to reserve to the copyright owner the right to require the destruction of such copies, even if the audience has paid for the transmission of the work.

The central threat posed by technological protection mechanisms and their legal protection by the Digital Millennium Copyright Act is whether or not copyright arising from the Statute of Anne will survive as an instrument for the promotion of learning, or if we will be cast back to the Stationer's Copyright. There can only be progress in the useful arts and science if there is access to works. The question arising from § 1201(a) is whether there will be a guarantee of access to lawfully-acquired works, or not. This larger issues of access to a work, and the consequent use of a work, will eventually be reflected in the resale price of works sold under authority of § 109(a). Hearings would provide a basis to improve Congressional understanding of these issues. It is my sincere hope that Congress will take note of the wildly one-sided nature of its recent actions regarding copyright, and take corrective action insuring that use of copyrighted works outside the scope of § 106 is guaranteed. Hearings are urgently needed to begin this process.

Sincerely,

Paul Fenimore

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[1] Page 1, ¶ 5: "It is clear that Section 109 does not apply to works distributed by transmission because application of Section 109 to such works would involve both the reproduction of the work (as to which no exception is provided and, accordingly, the copy being transferred is not 'lawfully made') as well as its distribution. Secondly, the owner of a copy of the work would not be disposing of the possession of that copy."

[2] If on the other hand one were to claim that a copy made into a computer's RAM was not a copy until written to disk, then the existing fair use exemptions in §117 of the Copyright Act would be nonsensical.

American Library Association
American Association of Law Libraries
Association of Research Libraries
Medical Library Association
Special Libraries Association

Before
The Library of Congress, The United States Copyright Office
and
The Department of Commerce, National Telecommunications
and Information Administration
Washington, D.C.

Inquiry Regarding Sections 109 and 117) Docket No. 000522150-0150-01

Reply Comments of the Library Associations

These Reply Comments are submitted on behalf of the American Library Association, Association of Research Libraries, American Association of Law Libraries, Medical Library Association and Special Libraries Association (the "Libraries), in response to comments submitted pursuant to the Copyright Office's Request for Public Comment dated June 5, 2000.

The June 5, 2000 Request for Public Comment inquires about the effects of the amendments made by title 1 of the Digital Millennium Copyright Act ("DMCA") and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections. The Libraries would like to address several issues raised by interested parties, as well as respond herein to questions regarding Section 117 of the DMCA.

I. Section 109 of the Copyright Act should be updated to clarify that the first sale doctrine limits the copyright owner's right of distribution without regard to the method by which that right is exercised.

Contrary to the assumption embodied in Question 1(g) of the Request for Comments and advanced in the comments of Time Warner and the Copyright Industry

Organizations, the first sale doctrine does not need to be "expanded" to apply to digital transmissions. The Libraries believe, and caselaw confirms, that the *doctrine* itself, as it currently exists, attaches to such transmissions because it applies according to the scope of a property interest, not according to the object of that interest. See also Report to Congress, Comments of Karen Coyle for Computer Professionals for Social Responsibility. It is the *codification* of that doctrine that needs to be updated to ensure consistency with the purposes for which it was originally enacted.

A. The first sale doctrine applies to digital transmissions and streamed content

Time Warner and the Copyright Industry Organizations both argue that the first sale doctrine does not and should not apply to works distributed by digital transmission or streaming, because the owner of the tangible copy of the work does not transfer lawful possession of such copy. Time Warner Comments at 1; Comments of Copyright Industry Organizations at 2 and 4. The Libraries disagree.

First, as conceded by Time Warner, digital transmissions can result in the fixation of a tangible copy.[1] By intentionally engaging in digital transmissions with the awareness that a tangible copy is made on the recipient's computer, copyright owners are indeed transferring ownership of a copy of the work to lawful recipients. Second, the position advanced by Time Warner and the Copyright Industry Organizations is premised on a formalistic reading of a particular codification of the first sale doctrine. When technological change renders the literal meaning of a statutory provision ambiguous, that provision "must be construed in light of its basic purpose" and "should not be so narrowly construed as to permit evasion because of changing habits due to new inventions and discoveries." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156-158 (1975).

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[1] Time Warner notes: "The initial downloading of a copy, from an authorized source to a purchaser's computer, can result in lawful ownership of a copy stored in a tangible medium. If the purchaser does not make and retain a second copy, further transfer of that copy on such medium would fall within the scope of the first sale doctrine." Time Warner Comments at 3.

The basic purpose of the first sale doctrine is to facilitate the continued flow of *property* throughout society. The common law doctrine pre-dates even the 1909 Copyright Act, and judicial analysis has consistently focused on the scope of the property interest that has been transferred, not the nature of the land or chattel that is the object of that property interest.[2] The provision in section 109(d) that the rights under the section do not "extend to any person who has acquired possession of the copy or phonorecord . . . without acquiring ownership of it" further confirms that the first sale doctrine applies according to the scope of the property interest that has been transferred, rather than according to the object of that interest. 17 U.S.C. §109(d).

While section 109 of the Copyright Act appears to limit application of the first sale doctrine to "copies" and "phonorecords," this language is a result of publishing history, not doctrine. Historically, the public access to works of authorship that is the purpose of the copyright laws was facilitated by the distribution of physical "copies" and "phonorecords." In that context, the tangible copy-intangible copyrighted work distinction was an efficient proxy for distinguishing the copyright owner's exclusive rights in his work from the right to access and use that work that passes to a consumer in a first sale. As publishing technology and the law have evolved to allow for the rights of access and use to be marketed directly instead of in conjunction with possession of a tangible "copy," this proxy has lost some of its effectiveness.[3] Principled (as opposed to formalistic) application of the first sale doctrine now requires looking directly to the property interest for which the copyright owner or publisher has been compensated in an initial transaction.

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[2] *See, e.g., Henry Bill Publishing Co. v. Smythe*, 27 F. 914, 925 (S.D. Ohio 1886) ("The owner of the copyright may not be able to transfer the entire property in one of his copies, and retain for himself an incidental power to authorize a sale of that copy…and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale….A genuine copy…carries with it the ordinary incidents of alienation belonging alike to all property."); *Step-Saver Data Systems, Inc. v. Wyse Technology and The Software Link, Inc.*, 939 F. 2d 91 (3d Cir. 1991) (applying a functional analysis to determine the scope of the property interest transferred and invalidating a box-top software license on grounds that it was properly considered proposed—but rejected—contract terms.)

In *United States v. Masonite Corp.*, the Supreme Court held that whether a particular disposition of a patented article is equivalent to a "first sale" is not governed by "the form into which the parties chose to cast the transaction. The test has been whether or not there has been such a disposition of the article that it may fairly be said that the patentee has received his reward for the use of the article." *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942). This rule has been widely applied in the copyright context, *see, e.g., Platt & Munk Co., Inc. v. Republic Graphics, Inc.*, 315 F. 2d 847 (2d Cir. 1963); *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881 (E.D. Pa. 1964). The "disposition-reward" rule clarifies that when a copyright owner exercises the right of distribution, the owner is not merely distributing physical objects: *the owner is effectively distributing the right to the end consumer to access copyrighted content that is fixed therein.* In other words, the right to access the copyrighted content must not be confused with the incidental possession of the object that facilitates practical exercise of the right. *It is access to the copyrighted material which has been parted with by the*

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[3] Streaming technologies allow for copyrighted content to be transmitted in such a way that only a few seconds worth of content is "fixed" in a receiving device at any given time. Nevertheless, during the course of transmission, an entire work can be sent, stored and viewed.

copyright owner in first sale, and it is that right of access which is alienable under the first sale doctrine, regardless of whether it is facilitated by tangible or intangible means.

B. When a material object is sold or licensed for the specific purpose of facilitating access to a copyrighted work, the right to use that work is not separable from the material object

Consistent with their position that the first sale doctrine applies to tangible objects rather than property interests, the Copyright Industry Organizations argue that section 109 provides for the alienability of the material chattel in which digital content is fixed, but not for the alienability of the authorization to access that content. Copyright Industry Organizations comments at 4. This interpretation converts the first sale doctrine into a provision that allows consumers to alienate solely the tangible disc, floppy, or hard drive in which copyrighted content has been fixed, while the copyright owner maintains perpetual control over the right to access and use the encoded content that is fixed therein. This position contravenes both copyright law and the common law history of the first sale doctrine, not to mention common sense.

When a consumer purchases a book, he purchases more than just a physical object consisting of printed words on bound paper. "A book is … a particular kind of 'copy' of a work of authorship." Senate Report on the Copyright Act of 1976 at 52 (1975), *reprinted in* 8 Nimmer On Copyright at App. 4A-98 (defining the term "book"). This "copy" has been marketed for the specific purpose of facilitating access to the copyrighted content; indeed, the right to access the content is a fundamental and inseparable part of the value for which a copyright owner is compensated in a first sale. Accordingly, few people would argue that the first sale right to lend or sell a book extends only to the bound paper on which words have been fixed, but not to the right to read those words. Similarly, when a consumer acquires copyrighted material in a pre-fixed digital form, he acquires a "copy" of a work of authorship, not merely an optical or floppy disc or an encoded digital file. It is this "copy" and all the rights it was intended by the Copyright Act to facilitate that are alienable under the first sale doctrine.

The Copyright Act defines "copies" as "material objects in which a work *is* fixed," not as material objects in which a work *may be* fixed. 17 U.S.C. §101. Technology that allows access to a copy to be separated from physical possession of that copy did not exist when this definition was written, and Congress cannot be understood to have sanctioned such a practice. Anyone who holds otherwise may be misreading the section 202 provision that "transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object." 17 U.S.C. §202. Rights in a "copyrighted work" are not equivalent to rights in a "copy" of that copyrighted work. The "rights in the copyrighted work" that are retained by the copyright owner after the first sale are the six exclusive rights enumerated under section 106 of the Act. 17 U.S.C. §106. A "right to control access and use" of the copyrighted work is notably absent from the section. To the extent that the anti-circumvention provisions of chapter twelve have been interpreted as granting the copyright owner a functional "right to control access," the legislative history of the DMCA suggests that the right was intended to facilitate the distribution of access "keys" as an *alternative* to tangible copies. Ensuring against a "pay-per-use society" requires clarification that the right to "distribute access" is extinguished according to the terms of the first sale doctrine.

To ensure that application of the first sale doctrine remains consistent with the purpose it was intended to serve—*ensuring against restraints on the continued flow of useful knowledge throughout society*—section 109(a) of title 17, United States Code should be updated to clarify that first sale rights attach according to the scope of the property interest that has been transferred in a first sale, without regard to the tangible or intangible object of that interest:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, *or the owner of any right of access to the copyrighted work*, or any person authorized by such an owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy, phonorecord, *or right of access*.

II. A copy made in the course of an authorized download of a copyrighted work is transferable under the first sale doctrine

The comments submitted by Time Warner concede that downloading digital content from an authorized source may result in ownership of a copy "lawfully made under the Copyright Act." However, Time Warner also argues that the first sale doctrine permits this copy to be alienated only in conjunction with the physical disc or hard drive in which it is fixed. The Libraries disagree.

The legislative history of section 109(c) demonstrates that the copyright owner's reproduction right is properly limited for the purpose of allowing consumers to exercise traditional rights in new technological environments. In the House Report on the 1976 Act, Congress recognized that indirect display of a copy of a copyrighted work by means of television, cable, opaque projection, or optical transmission entailed copying that ordinarily would infringe the reproduction right unless permitted under fair use or another statutory exemption. H.R. Rep. No. 94-1476, at 79-80 (1976), as corrected in 122 Cong. Rec. H. 10727-8 (daily ed. Sept. 21, 1976), *reprinted in* 8 Nimmer on Copyright at App. 4-55. Nonetheless, the public display provision of the first sale doctrine allows consumers to indirectly display a copy, provided that only one image is projected at a time to viewers located in the place where the copy is located. *See* 17 U.S.C. §109(c). The expressed intention of the Judiciary Committee was "to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected." *Id.* at 80.

The incidental copying privilege that is implicit in section 109(c) is properly extended to the entire first sale doctrine. Formalistic application of the exclusive reproduction right must not prevent consumers from utilizing new technologies, and it must not prevent traditional user rights from being replicated in new technological environments. The potential for incidental copies to harm the interests of copyright owners should instead be addressed by legislating "reasonable restrictions" on the use of such copies. Requiring that the original copy of a digital work be deleted or disabled at substantially the time of transfer under the first sale doctrine is one such "reasonable restriction." *See* Comments of the Digital Futures Coalition ("DFC"). A deletion requirement would allow a reproduction that is incidental to a transfer under the first sale doctrine to be distinguished from copies that infringe upon the copyright owner's legitimate market for distribution of his work. Failure to delete or disable the original copy would convert the incidental copy into an infringing copy. Accordingly, along with the DFC and others, the Libraries strongly support amendment of the Copyright Act by addition of the following to the end of section 109 of title 17, United States Code:

> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement.

We note that this proposal was part of the Boucher-Campbell Bill, H.R. 3048 (105th Congress), that was co-sponsored by 53 members. This legislation reflected many of the concerns of interested parties to digital copyright issues that were unresolved by the DMCA.

III. Federal copyright policy should make clear that the first sale doctrine and other limitations on copyright monopolies pre-empt contrary non-negotiated license terms

While federal copyright law is not generally intended to preclude private contracts, pre-emption of contract terms for the purpose of effectuating a compelling federal policy is proper. *See, e.g., Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F. 2d 150, 153 (2d Cir. 1967), *cert. denied*, 393 U.S. 826 (1968) (applying state law to a question of the parties' intent with regard to an assignment contract because "a federal common law of contracts is justified only when required by a distinctive national policy…"). Maintaining the copyright balance that promotes public access to copyrighted works is a compelling federal policy. This balance is currently being undermined by uncertainty resulting from the interplay between copyright law, para-copyright law such as the anti-circumvention provisions, and state contract law. This uncertainty will only be compounded as the anti-circumvention provisions take effect and as the Uniform Computer Information Transactions Act ("UCITA") is enacted at the state level.

The Libraries believe that much of this uncertainty is attributable to lack of consensus regarding the circumstances in which a distribution that has purportedly been made under license is properly construed as a sale. As described in the comments of Charles Lee Thomason, courts have assessed factors ranging from course of performance to the number of payments to the permitted term of possession of the physical "copy." However, these factors have not been applied in any uniform way and judicial analysis has sometimes been vague. *See* Comments of Charles Lee Thomason at 8. The Libraries support the position taken by the National Association of Recording Merchandisers and Video Software Dealers Association that "care must be taken…to distinguish between the lawful licensing of a copyright, and the purported licensing of 'rights' not recognized by copyright…." Comments of National Association of Recording Merchandisers and Video Software Dealers Association at 18. Federal recognition of this distinction is especially appropriate now given that evidence has already indicated that the federal anti-circumvention provisions are being utilized to force abrogation of the very laws they were intended to uphold.

The balance between the remuneration interest of copyright owners and the public's interest in access to copyrighted works will be significantly undermined and will continue to be unreasonably skewed in favor of copyright owners unless there is a clarification of federal copyright policy, as well as enactment of remedial and preventative legislation. Accordingly, the Copyright Act should state unambiguously that non-negotiated license terms are pre-empted to the extent that they conflict with the Act. Consistent with the model from the Boucher-Campbell Bill cited above (in Section II of these comments) and supported by the Libraries and a broad coalition of interested parties, H.R. 3048, section 301(a) of the title 17, United States Code should be amended by adding the following at the end thereof:

> When a work is distributed to the public subject to non-negotiable license terms, such terms shall not be enforceable under the common law or statutes of any state to the extent that they:
>
> (1) limit the reproduction, adaptation, distribution, performance, or display, by means of transmission or otherwise, of material that is uncopyrightable under section 102(b) or otherwise; or
>
> (2) abrogate or restrict the limitations on exclusive rights specified in sections 107 through 114 and sections 117, 118 and 121 of this title."

IV. Comments on Section 117

The Libraries also wish to respond at this time to the questions posed with regard to Section 117. Section 117 provides critical incidental and archival copying rights to the owners of copies of computer programs. Because many more categories of works are now being published in digital formats, section 117 must be updated to clarify that the rights therein apply to all rightfully possessed digital media.

a) What effect, if any, has the enactment of prohibitions on circumvention of technological protection measures had on the operation of section 117?

b) What effect, if any, has the enactment of prohibitions on falsification, alteration or removal of copyright management information had on the operation of section 117?

Some media and consumer electronics companies are planning or implementing access control technologies to enforce the private license terms that are incorporated into Copyright Management Information. *See* Comments of John M. Zulauf at 1-2. The Libraries' first response in this inquiry demonstrated the extent to which these license terms systematically restrict the copyright limitations that are codified in section 117 and throughout the Act. Consumers may ultimately be exposed to criminal prosecution and civil liability merely for exercising the archival and incidental copying rights that have been granted under section 117 and other provisions of the Act.

The distribution of works in encrypted form promises to become widely used as the anti-circumvention laws make the technology more attractive to publishers. Access to an encrypted work may be gained only by separately acquiring the intellectual property "key" that is necessary to de-scramble the work. When the work is fixed into a tangible object prior to distribution (i.e., a CD-ROM or DVD), the key is typically incorporated into a playback device. This essentially means that copies of copyrighted digital works are usable only in playback devices that have been licensed by the copyright owner. As a condition of that license, these playback devices also incorporate the technology to read and enforce Copyright Management Terms. Because of this linking of decryption keys, playback devices, and copyrighted works, consumers may be unable to make archival copies or "space shift" content to a new format as playback technologies evolve. Long-term access to a particular digital work may require continually repurchasing access in new formats. Some works may become unavailable as publishers cease operations or discontinue sales of the "keys" to older works that have lost mass appeal.

The prohibitions on circumvention and falsification also affect the operation of section 117 when copyrighted works are distributed by transmission. When digital content is distributed by transmission, the decryption key may be transmitted separately—sometimes only temporarily—upon payment of a per-view license fee, entry of a password, or dial-in from a particular terminal. Because an archival copy of a scrambled work is unusable without a copy of the decryption key, allowing the copyright owner to maintain perpetual control over decryption "keys" may render the archival copying rights provided under section 117 meaningless. Libraries of the future may be left with archival copies that have become unavailable for actual use because the access "key" is no longer available or has been made available only upon payment of an exorbitant fee.

> **c) What effect, if any, has the development of electronic commerce and associated technology had on the operation of section 117?**
> **d) What is the relationship between existing and emergent technology, on one hand, and section 117, on the other?**
> **e) To what extent, if any, is section 117 related to, or premised on, any particular technology?**

The language of section 117, which limits application of the section to "computer programs," reveals that it was legislated in the particular technological environment of 1980. 17 U.S.C. §117. However, the principle that is implicit in the section is that consumers must have the legal rights to make copies that are essential to using copyrighted material in conjunction with a computer.[4] The Libraries believe that application of this principle to the current technological environment warrants clarifying that the rights provided under section 117 extend to all digital media, not just "computer programs" as defined under section 101.

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[4] Section 117 embodies the recommendations of the Commission on New Technological Works with respect to the application of copyright law to computer software. H.R. Rep. No. 96-1307 (Part I), reprinted in 1980 U.S. Code Congressional and Administrative News 6460, 6482. The CONTU Final Report noted

Since the section was enacted, the development of electronic commerce has increased the categories of works for which incidental and archival copying rights are essential to meaningful use. Many types of works that were formerly distributed in print and analog formats are now being distributed only in digital formats. While the Libraries believe that the copying rights at issue already exist under fair use, making them explicit could help to eliminate some of the uncertainty that is currently preventing these rights from being fully and consistently exercised.

Maintaining the proper copyright balance requires clarification of several copying rights. First, virtually all devices on which digital content can be played back process that content by loading all or some portion of it into memory. Even copyrighted material that is distributed by streaming is very temporarily copied into a "buffer" section of the playback device's RAM. Temporary copies of this nature have been held to infringe copyright. *See MAI Sys. Corp. v. Peak Computer*, 991 F. 2d 511 (9th Cir. 1993). The Comments of Time Warner at 1 endorse the argument that the copy made during a transmission is not a "lawful copy." However, because the copyright owner has authorized the transmission of the copy of the work to the recipient and because the owner is aware that it is inherent to the computer technology that a copy will be made on the recipient's machine, then the intentional act of authorizing the transmission should

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that using a computer program required loading it into the memory of a computer, which by definition involved "copying." CONTU Final Report, p. 13. The Report recognized that "one who rightfully possesses a copy of the program" should be provided with a legal right to make a copy as an essential step in using it. *Id.*

make the recipient's copy "lawful." Copyright law, as well as policy, should make clear that incidental copying rights are essential to the ability of consumers to make meaningful use of digital works without risking liability.

Second, all digital content is prone to deletion, corruption, and loss due to system crashes. Consumers must be permitted to protect their investments. Archival copying rights are as critical today to the growth of digital publishing as they were to the growth of the computer software industry in the 1980s. Third, computer hardware and software operating systems are subject to rapid technological evolution. The fair use right to "space shift" to new formats for personal use should be codified to protect against abrogation of that right by licensing terms incorporated into CMI. Fourth, temporary copying rights should be extended to individuals who are in rightful possession of copies lawfully made under the Copyright Act. A measure of this nature would enable practical exercise of the first sale right to sell, lend or otherwise dispose of rights in a digitally published work.

The Libraries believe that these essential copying rights could be protected within the framework initially proposed in H.R. 3048, which would have amended section 117 as follows:

- The title of section 117 of title 17 United States Code would be amended to read: "Limitations on exclusive rights: Computer programs and digital copies."
- Section 117 of title 17 United States Code would be amended by inserting "(a)" before "Notwithstanding" and by inserting the following as a new

subsection (b): "Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying

(1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and

(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

IV. Conclusion

The first sale doctrine and the limitations on computer program are two of the crucial stilts in the balancing act of copyright law. Questions have now arisen regarding the application of the doctrine and the limitation in the digital era to the making of copies and the alienability of certain copies lawfully received in the course of digital transmissions. While the DMCA intended to deal effectively with related digital era issues, the need for clarification of copyright policy has become more apparent and urgent. The Libraries urge the Copyright Office and NTIA to address these matters directly and forthrightly in its report and advise the Congress on remedial steps, including those proposed herein, to ensure maintenance of the essential balance of copyright law.

Respectfully submitted,

American Library Association
American Association of Law Libraries
Association of Research Libraries
Medical Library Association
Special Libraries Association

Date: September 5, 2000

Software & Information Industry Association

September 5, 2000

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Re: SIIA Reply Comments Relating to the Joint Study by the Copyright Office and NTIA on Sections 109 and 117 of the Copyright Act

Dear Messrs. Feder and Joyner:

The Software & Information Industry Association ("SIIA") appreciates the opportunity to respond to the public comments filed pursuant to the Federal Register notice of June 5, 2000 entitled, "Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act." SIIA respectfully files the following reply comments with the Copyright Office and the National Telecommunications and Information Administration ("NTIA") on behalf of its members. These comments are intended to supplement, and not supercede, the initial comments filed by SIIA on August 4th.

A. Appropriate Scope of the Section 104 Study

The first point we would like to address relates to the scope of the section 104 study and the fact that many (if not most) of the statements made in the comments filed by those who propose expanding section 109 and/or section 117 of the Copyright Act fall outside the scope. The study was first proposed on July 17, 1998 by Representative White in the form of an amendment that was adopted by the House Commerce Committee. The scope of the proposed study was extremely broad — it would have required a broad review of the relationship between the Copyright Act and electronic commerce.[1] However, when the House eventually passed the

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[1] *See* H.R. 2281, 105th Cong., 2d Sess., section 205(a) (1998).

Digital Millennium Copyright Act ("DMCA") the following month, the House decided to significantly limit the scope of the study to sections 109 and 117 of the Copyright Act only.[2]

As enacted, section 104 of the DMCA provides that:

> The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly evaluate —
>
>> (1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and
>>
>> (2) the relationship between existing and emerging technology and the operation of sections 109 and 117 of title 17, United States Code.

Section 104 further provides that the Copyright Office and NTIA shall "submit to Congress a joint report on the evaluation conducted."

Despite the definitive steps taken by Congress to limit the section 104 study to sections 109 and 117 of the Copyright Act, several of the comments — in particular, those filed by the Library Associations and the Digital Future Coalition — suggest that the Copyright Office and NTIA address issues relating to sections 108, 110 and 301 of the Copyright Act (among others).[3] In addition, the comments submitted by the Library Associations also raise issues that fall within the scope of the section 1201(a)(1) rulemaking[4] and other issues, such as the general licensing practices of copyright owners, that have no bearing on this study.

We urge the Copyright Office and NTIA to ignore those comments that do not expressly address section 109 or section 117. The section 104 study was not intended to be an open-ended discussion on the effect that new technologies have on the way copyrighted materials are created, produced, or marketed or whether copyright owners can or should have the right to use technological measures to control access or manage access to their works. Nor is it intended to be an investigation into the relationship between creators, intermediaries, customers and other parties or the manner in which copyrighted content is licensed. The sole issues that the

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[2] Because the Conference Committee did not alter the scope of language of the study, the enacted version of the study is identical to that passed by the House on August 4th.

[3] *See* Comments of the Library Associations at page 23; Comments of the Digital Future Coalition at pages 3-4.

[4] To the extent that the comments filed by the Library Associations relate to section 1201(a)(1) without regard for sections 109 or 117, these comments should have been timely submitted to the Copyright Office as part of that rulemaking process. An attempt to get them consider now — after the period for submitting comments in the section 1201(a)(1) rulemaking is closed — is improper. To ensure that these comments do not go unanswered in the event that the Copyright Office and NTIA opt to consider them, we respectfully request that all the written comments filed and the testimony provided by SIIA during the section 1201(a)(1) rulemaking process be incorporated by reference into SIIA's section 104 reply comments..

Copyright Office and NTIA are authorized to address here are: "the effects of the amendments made by [title 1 of the DMCA] and the development of electronic commerce and associated technology on the operation of sections 109 and 117 . . ." and "the relationship between existing and emerging technology and the operation of sections 109 and 117 . . . ." To the extent that issues are raised that do not fall within this two-part inquiry, these issues should be disregarded.

B. Applicability of the Fair Use Doctrine

Reference to the fair use doctrine and its applicability is noticeably absent from many of the comments of those who propose expansion of sections 109 and/or 117. Several commentators, most notably, the Digital Future Coalition ("DFC"), the Library Associations, and the Computer & Communications Industry Association ("CCIA") provide examples of activities that they believe justify expansion of section 109 and/or section 117.[5] In the process of discussing these examples and the parade of horribles that will ensue if sections 109 and/or 117 are not expanded, these commentators fail to discuss how the fair use doctrine would apply to these situations.

For example, the DFC and CCIA suggest that section 117 should be expanded to allow for the making of temporary copies during, among other things, the authorized playback of content through buffering, caching or streaming.[6] They propose that language be added to section 117 that would permit the making of temporary copies when such copies are "incidental to the operation of a device ..." and do "not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[7] [Hereinafter referred to as the "proposed section 117 language"]. There is no explanation by either of these organization as why the fair use doctrine would not apply to the authorized playback of content through buffering, caching or streaming, how it would apply to these situations, or why the proposed section 117 language is an improvement over the fair use doctrine.

It is unfortunate that these organizations — who have long been such strong advocates of the fair use doctrine — have omitted from their comments a discussion of the fair use doctrine and its applicability. It is not possible to consider the merits of the proposed section 117 language without such a discussion. We, therefore, respectfully request the Copyright Office and NTIA demand that these organizations explain why, in their view, the fair use doctrine does not apply or would not protect against the concerns identified in their comments.

To be clear, SIIA does not support expansion of section 109 or section 117 and is not taking a position in its comments as to how the fair use doctrine might apply in the broad context set forth by some of the commentators. We do, however, believe that in order for the Copyright Office and NTIA to thoughtfully and exhaustively consider the proposals of CCIA and DFC, these organizations must explain why they believe the fair use doctrine does not address their concerns and why their proposed language is an improvement over the fair use doctrine.

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[5] *See* Comments of DFC at page 3-4; Comments of CCIA at page 2-3.

[6] Id.

[7] Id.

The Home Recording Rights Coalition ("HRRC") takes the same approach and recommends the same language be added to section 117 as CCIA and DFC. However, instead of ignoring fair use, HRRC addresses it by stating that "temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the fair use doctrine."[8] HRRC goes on to say that even though they believe that the fair use doctrine would address their concerns they recommend expansion of section 117 "to eliminate legal uncertainty."[9]

If the goal of expanding section 117 is "legal certainty," this goal will not be achieved with the language the DFC, HRRC, CCIA and others are suggesting to add to section 117. While the fair use doctrine, as codified in section 107 of the Copyright Act, may not be a paragon of clarity and certainty, it is a well-established doctrine that reflects decades of analysis and application in case law, law review and treatise commentaries, and legislative history. The suggested language proposed by these organizations has none of this. More significantly, the suggested language is actually much broader and ambiguous than the fair use doctrine. As a result, the proposed section 117 language would make the legal status of temporary copies exponentially less certain than existing law.

C. *Clarification of the Scope and Effect of the First Sale Doctrine*

There were several comments that made misstatements about how section 109 applies to copyrighted works in digital form. To avoid future confusion, we think it is important to correct these misstatements and to clarify the scope and applicability of the first sale doctrine to works in digital form.

The first sale doctrine, as embodied in section 109 of the Copyright Act, does not discriminate between digital and non-digital content. It applies to content in digital form to the same extent that it applies to content in analog or other non-digital forms. Therefore, phrases such as a "digital first sale doctrine" are misnomers.

The first sale doctrine does distinguish, however, between personal property rights and copyright rights. It does this by allowing, with appropriate exceptions, a person who owns a particular copy of a copyrighted work to dispose of that copy without running afoul of the copyright owner's exclusive right of distribution under section 106(3) of the Copyright Act. Unauthorized acts of reproduction or performance, for instance, would not be excused by the first sale doctrine because they do not encumber one's personal property rights. Thus, contrary to some of the comments,[10] a person may (in lieu of a binding and enforceable agreement to the contrary) transfer his CD to another person in accordance with the first sale doctrine, but may not make a copy of the content contained within that CD — even if that copy is made in the course of and incidental to a transfer.

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[8] *See* Comments of HRRC at page 6.

[9] Id.

[10] *See* Comments of the Library Associations at page 20; *See also* Comments of the National Association of Recording Merchandisers and Video Software Dealers Association.

Several commentators recommended expansion of section 109 on the basis that failing to do so would harm electronic commerce. One of these commentators claimed that "[w]ithout a digital first sale privilege, consumers will not buy into electronic commerce" and that "the initial forays by content companies into online sales through a variety of retail outlets, . . . is no more than a toe in the water."[11] In fact, at least with regard to software, nothing could be further from the truth. This is supported by a recent report issued by the Department of Commerce stating that that, in 1997 (the last year for which numbers are available), "[e]lectronic shopping and mail-order houses sold $22.9 billion in computer hardware, software and supplies . . . *more than any other types of retail business*." (emphasis added) [12]

D. Response to Simultaneous Destruction Proposal

Some commentators suggested that section 109 should be expanded to apply when a person transmits a copy to another person while simultaneously destroying his particular copy [Hereinafter referred to as the "source copy"] at the time of the transmission. Several of those who support a "simultaneous destruction proposal" suggest amending section 109 as originally proposed in H.R. 3048 from the 105th Congress, which provided:

> Section 109 of title 17, United States Code, is amended by adding the following new subsection at the end thereof:
>
> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement.

The rationale for this proposal is that by destroying the source copy, the conduct more closely resembles a traditional distribution (to which the first sale exception would apply) because the same number of copies exist at the end of the transaction as at the beginning of the transaction.[13]

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[11] *See* Comments of the Digital Media Association at pages 11, 13.

[12] *See* Commerce News, "Electronic Shopping and Mail-Order Houses Account for Most Computer Hardware and Software Sales, Census Bureau Reports," (Aug. 11, 2000)

This proposal ignores some of the practical impediments inherent in the distribution of copyrighted works that are contained on traditional media that limit the applicability and use of the first sale doctrine. For instance, over time the quality of a book or analog audiotape will deteriorate and, as a result, the market demand for that particular copy of the book or audiotape will disappear. This is not the case with content residing in an e-book, MP3 file or other digital media. These digital products will not degrade in quality, and thus the market demand for copies of these particular products will compete with the market for "new" (*i.e.*, unused) copies or other versions of the same work. Thus, because the quality of the first copy of a digitized work is no different than the thousandth copy, the market demand for generational[14] digital copies will negatively impact the copyright owner's market for copies of the work significantly more than traditionally has been the case.

For example, a paperback may be transferred from one reader to another, but at some point in this chain the integrity and appearance of the paperback becomes so deficient that the next reader in line will opt to purchase a "new" copy of the same paperback. In the digital environment, factors such as the integrity and appearance of a work never become relevant, and so the chain of readership continues unabated. Thus, taking this argument to its logical extreme, one copy of a copyrighted work could potentially serve the entire market for that work. In effect, each possessor of a digital copy of a book could become its own bookstore and/or library. This holds especially true with recent peer-to-peer technology, like Napster or Gnutella, that permits one copy of a work potentially to serve millions. Clearly, no copyright owner could stand to stay in business very long if its market is usurped by a handful of copies transferred among innumerable amount of consumers.

Furthermore, in the physical world, the re-distribution of a particular copy under the first sale doctrine was restricted by the geography and circle of people known to the holder of that copy, as well as the time and effort necessary to re-distribute the copy. These inherent constraints on the first sale doctrine limited the potential effect on the market for the work. In the digital world, however, re-distribution is limited neither in geographic scope nor to known people. Instead, digital content can be transmitted to millions of people, both known and unknown, at the stroke of a key or a click of a mouse. As a result of the dramatic increase in ease by which a digitized work can be distributed, the number of times a work is transferred from one party to another (*i.e.*, the frequency of use of the first sale doctrine) would substantially increase, which in turn would significant diminish the copyright owner's ability to obtain a fair return from the work.[15]

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[13] The language in the simultaneous destruction proposal goes well beyond this rationale, however. Accordingly, SIIA strongly opposes the language contained in H.R. 3048 to expand section 109 and, in particular, the addition of broad exceptions to the performance and display rights as proposed in H.R. 3048.

[14] A "generational" copy is used here to denote any copy that is made from the source copy or from a subsequent copy that has its roots in the source copy.

Most significantly, the simultaneous destruction proposal also has some significant evidentiary and procedural problems that make it infeasible. For instance, it would not be possible or practical for a copyright owner or the courts to verify that the source copy was discarded. Further, even if it was possible to determine that the source copy had been discarded, it would not be possible to verify that it was done so simultaneously. It would take little effort on the part of someone to engage in acts of piracy and, upon being discovered, delete the source copies in order to claim the first sale defense at trial.

Moreover, if the simultaneous destruction proposal were adopted, copyright owners might have no choice but to monitor computer users and consumers for simultaneous destruction to protect their works from piracy. Such monitoring might stifle the intended purpose of first sale exception, which is to encourage the alienation of copyrighted works, and could have broad adverse privacy implications.

It has been suggested that these evidentiary and procedural problems could be avoided by using technical protections that would instruct the originating computer to delete the source copy when the user attempts to transmit it to another person.[16] The problem with this recommendation is that the technology is not now available that would effectively perform this function.[17] Moreover, this proposed solution is bound to raise objections from libraries, universities and other opponents of technological protections on the basis that it fails to account for instances where the transmitter may be entitled to retain a copy of the work under the Copyright Act or by agreement.

Even if technological protections that allow transmission and simultaneous destruction of a source copy become available and feasible to implement in the future, this would not warrant amending of section 109 to allow the use of such technology as an exception to the exclusive rights of distribution and reproduction. Given the underlying purpose of the first sale doctrine

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[15] For example, assume that there are 100 people who desire a copy of a particular work. The copyright owner will establish a price for copies of the work based on the fact that, of the 100 people 80 of them will purchase new copies and 20 of them will obtain "used" copies through a transfer from the original or subsequent owner of that copy. In the digital environment, because transfer of a copy is significantly easier, of the 100 people who would like a copy 60 of them might obtain used copies through someone other than the copyright owner. As a result, the copyright owner's expected return from his creative energies will be significantly less than anticipated, thereby creating a disincentive to create and distribute new works to the masses.

[16] This suggestion is different than the one suggested by the Digital media Association ("DiMA"), which recommends using encryption to protect files in a way that allows them to "be copied freely, but [not] accessed without the decryption key." *see* DiMA comments at page 8. This recommendation is unworkable for the same practical and evidentiary reasons the non-technological simultaneous destruction proposal does not work. Under this recommendation, it would be impossible to police or prosecute anyone for copyright infringement because everyone is allowed to have a copy of the content and could obtain a decryption key to "legitimize" their copy upon discovering that they are being investigated for piracy.

[17] At present, one cannot transmit an electronic copy without implicating the copyright owner's reproduction right. There is no technology available that allows a particular copy to transmitted without a copy being made.

and the effect on the copyright owner's interests, such an amendment would necessarily entail an unwarranted broadening of the scope and purpose of the first sale exception.[18]

E. Response to Specific Library Associations Comments

In discussing section 109, the Library Association comments raise several issues that are irrelevant to the section 104 study. For instance, the Library Associations complain of monetary constraints and administrative problems, such as difficulty keeping track of myriad of passwords for off campus users,[19] inability to make works available to visiting professors,[20] alleged invasion of privacy that takes place when a work is accessed,[21] and lack of expertise interpreting contract terms.[22] While we are sympathetic to these concerns, if truth be told, these concerns are internal administrative problems not unlike problems that many organizations face. They have nothing to do with the first sale doctrine.

For example, the problem of making works available to visiting professors and community members can be solved by making technical changes in the way that a library's network identifies its users. Likewise, the so-called privacy concerns can be addressed quite simply through filtering or anonymizing technology that allows publishers to ensure their license terms are being adhered to while ensuring that private information is not disclosed. We urge the Copyright Office and NTIA to disregard these comments and similar comments, as noted above, because they have no bearing on the two-pronged inquiry that is the subject of this study.

In addition, we also believe it is necessary to correct some misstatements made in the Library Associations comments. For example, on page 16 of the comments, the Library Associations states that:

> Elsevier has granted electronic access to their journals, but tells us they will only provide access for a 9 month period, so we will lose access to those electronic issues that we once had. We cannot afford their Science Direct product at the moment, which would give us more comprehensive, stable access to their journals.

This statement is misleading. Elsevier Science gives free — repeat free — electronic access to the most recent nine months of their science journals to libraries that subscribe to the print version of the journal. These libraries retain copies of the printed periodicals and are free to dispose of these copies as they wish consistent with section 109. Elsevier Science does offer to libraries the ability to retain access to all electronic materials they had access to (even those that are older than nine months), but because of the increased costs involved in doing so, Elsevier Science cannot include this service in its free service. In addition, the library retains online access rights indefinitely to the issues of the journal published during the time period during which they subscribed — including to back issues of discontinued titles, even after the library terminates its license.

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[18] *See* SIIA's initial comments.

[19] *See* Comments of Library Associations at page 6.

[20] Id.

[21] Id. at page 9.

[22] Id. at page 13.

Furthermore, Elsevier Science recently announced their commitment to carry out perpetual archiving of back issues of all their scientific journals, and has pledged not to dismantle their archival facility without depositing copies in selected libraries or similar approved archives. They have also offered libraries the opportunity to maintain their own local archives of their material and are actively working with library organizations and national libraries worldwide, including the Library of Congress, to develop new models for publisher-library co-operation to ensure appropriate digital archiving.

We provide this explanation as just one example of a situation where the Library Associations have expressed an alleged concern without providing all the facts or by providing misleading information. There are other examples too numerous to mention here. We, therefore, caution the Copyright Office and NTIA to question the examples provided by the Library Associations in their comments unless and until they can be confirmed by relevant parties.

F. Proposed Expansion of Section 117

Several commentators suggest that there is a need to expand the scope of section 117 beyond computer programs. They suggest that one should be allowed under section 117 to make back-up copies of all copyrighted works in digital form for the sole reason that the copyright law presently allows owners of one other type of digital work (*i.e.*, computer software) to make back-up copies. SIIA opposes this proposal because the premise on which it is based is faulty.

Unlike when section 117(a)(2) was first enacted, today it has little, if any, utility. According to PC Data, 97% of all the software sold in the United States in 1999 was sold on CD-ROM. In 2000YTD, 98% of all software was sold on CD-ROM. Once a computer program is loaded from a CD-ROM to one's computer, there is no need to make a back-up copy, because, in effect, the CD-ROM serves as the back-up copy and CD-ROMs have an estimated failure rate of significantly less than 1%.[23] Moreover, because a CD-ROM is capable of storing up to roughly 650 MB (which translates to 450 3.5" 1.4 MB floppy discs), a person would need a CD recording device to be able to make a back up copy of their CD-ROM. Penetration of these devices into the home computing market is extremely limited at this point. Thus, very few individuals have the ability to make a back-up copy and even fewer actually desire to make such back-up copies. It seems senseless to expand section 117(a)(2) to other copyrighted works when it is being used so sparingly today for computer software and because the justification for the provision no longer exists.

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[23] An informal survey of SIIA members and other CD-ROM manufacturers & distributors estimated that the failure rate was approximately one tenth of 1%.

SIIA also opposes the extension of section 117 to temporary copies of a work. Such a provision is unnecessary because the user's interests are adequately protected under existing law. Under existing law, the user's reproduction of the work may be authorized by the copyright owner or permitted by law, such as by the fair use doctrine. As noted above, SIIA believes that those who support an expansion of section 117 should be compelled to demonstrate to the Copyright Office and the NTIA why existing defenses, including fair use doctrine, would not apply.

G. Response to Comments on UCITA and Licensing Restrictions

Comments filed by the DFC, the Library Associations and Patrice Lyons raise issues relating to licensing as well as the Uniform Computer Information Transactions Act ("UCITA"). Although, as stated above, SIIA believes that these issues should not be considered in the section 104 study, because many of these comments are incorrect and misleading, we feel it necessary to clarify and correct these comments.

Despite comments of the DFC and Library Associations to the contrary, UCITA promotes the fundamental principle of freedom of contract and does not endorse the imposition of restrictive contractual provisions on libraries, consumers or users. In fact, UCITA expressly prevents a licensor from enforcing any provision of a contract that would undermine the fundamental public policies on which the Copyright Act is based. Specifically, Section 105(b) of UCITA reads as follows:

> (b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

This position is further bolstered by the Reporter's Notes accompanying this section, which makes clear that "fair use" is an important part of the considerations a court should weigh in determining the validity of a contract.[24]

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[24] The Reporter's Notes state:

> The offsetting public policies most likely to apply to transactions within this Act are those relating to innovation, competition, fair comment and fair use. Innovation policy recognizes the need for a balance between protecting property interests in information to encourage its creation and the importance of a rich public domain upon which most innovation ultimately depends. Competition policy prevents unreasonable restraints on publicly available information in order to protect competition. Rights of free expression may include the right of persons to comment, whether positively or negatively, on the character or quality of information in the marketplace. Free expression and the public interest in supporting public domain use of published information also underlie fair use as a restraint on information property rights. Fair use doctrine is established by Congress in the Copyright Act. Its application and the policy of fair use is one for consideration and determination there. However, to the extent that Congress has established policies on fair use, those can taken into consideration under this section.

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The DFC, the Library Associations, and Patrice Lyons also suggest, because of the licensing practices of copyright owners and UCITA, that the Copyright Office and the NTIA should explore the interplay between federal copyright law and state contract law.[25] The DFC specifically proposes that the Copyright Office and NTIA recommend in the section 104 study that Congress amend 17 U.S.C. 301.[26]

As one scholar has noted:

> [G]iven the ease of copying and distributing software, software licensors may need contractual limitations on the first-sale doctrine to ensure viability. If these contracts were deemed unenforceable under section 301(a), the information industry might not be economically sustainable. Without adequate information incentives, the intellectual property goal of increasing production and sharing of information with the public would ultimately suffer.[27]

Issues related to the interplay between the federal copyright law and state contract law are not new issues. While the DFC, Library Associations and Ms. Lyons would like to give the impression that these issues are new and have not previously been considered by Congress, that quite simply is not the case. For instance, issues relating to the relationship between section 109 and state contract law were thoughtfully considered by Congress when the 1976 Copyright Act was enacted.[28] Moreover, this relationship has been the subject of numerous congressional debates and court decisions over the years.[29] We can see no reason why these issues should be taken up at this time when the groups that have raised these issues have not demonstrated why they should be, how they relate to sections 109 or 117, or why these issues are any different than the issues that arose when Congress enacted the 1976 Copyright Act, or subsequent amendments thereto (including the DMCA).

The final point we would like to address regarding licensing relates to the Library Associations' claims that licenses for digital works prevent these works from being donated to libraries. While there likely are contracts between copyright owners and consumers that do prevent donations, this is the exception rather than the rule. As a general matter, agreements between consumers and copyright owners for software and digital content do not prevent the consumer from donating the copy of such software or content purchased by that user to a library or other eleemosynary institution.

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[25] *See* Comments of Library Associations page 25; Comments of Patrice Lyons at page 9, Comments of DFC at page 4.

[26] *See* Comments of DFC at page 4.

[27] Pratik A. Shah, "Berkeley Technology Law Journal Annual Review of Law and Technology, Intellectual Property, Copyright, The Uniform Computer Information Transaction Act," 15 Berkeley Tech. L.J. 85 (2000).

[28] The legislative history accompanying Section 109 of the Copyright Act clearly sets out parameters regarding licenses and the enforceability of agreements between private parties. *See* H.R. Rep. No. 94-1476, 2d Sess., at 79 (1976).

[29] *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), *rev'g* 90 F. Supp. 640 (W.D. Wis.)

In closing, we would like to once again thank the Copyright Office and NTIA for providing us an opportunity to file these reply comments. If we can prove any supplemental information or clarify any of our comments please do not hesitate to contact us.

Sincerely,

Ken Wasch
President

Michael (Mickey) McGown

Reply comments for DMCA rulemaking

I appreciate the opportunity to express my reply comments to the Copyright Office. As part of this rulemaking process to determine which classes of works might be exempted from the prohibitions in 1201, many people, including myself, have suggested that all classes should be exempt. I realize that would, in effect, overturn the law via rulemaking, which I doubt Congress intended. But there must have been some concern about how this rule would affect users of copyrighted works, enough to ask the Librarian to determine possible adverse effects. My "all classes should be exempt" position was, I'll admit, an over-reaction to the way the law is already being applied. In these comments, I will suggest an alternative.

I believe that the copyright law changes prompted by the DMCA have raised the attention of the public, particularly persons in the field of computers, because of a misunderstanding regarding congressional intent. I have studied this issue closely for several months because I see this law being applied in ways that I don't think were intended, in ways that will ultimatley affect me. Interpretation of 1201 varies greatly, it mostly seems to depend on your point of view as a user of works versus as a creator of works. There are parts of 1201 that are worded such that it can reasonably be understood more than one way, and it is becoming a growing issue.

As a hobbyist musician, I understand and support the goal of protecting the rights of a copyright holder. I support the use of technological protection measures in the course of preserving rights granted to copyright holders. The statement , in 1201(a)(1)(A), "No person shall circumvent a technological measure that effectively controls access to a work protected under this title" seems like a good way to put it. It was correctly pointed out earlier in this process, that various measures have been in use for many years, both hardware and software, without too much of an adverse effect.

As an end user, however, my reaction to 1201 is sharp. Why? Because the new provisions are being interpreted as not tied to an act of infringement. An act of circumvention is seen as an indication of ill-will and separately punishable without the need for any accompanying wrongdoing. The same is being assumed for possession of the tools, and for allowing others to obtain the tools. I believe that this is a harmful and inconsistent interpretation, and not likely the intention of Congress.

I assert that one plausible reason that previous protection measures did not have serious adverse effects on non-infringing users is that they were easily, and legally, defeatable. Archival of protected floppy disks, for instance, requires a non-standard copy utility, but such tools have been legally available in the marketplace. I support the right of the copyright holder to apply such protection measures, but I can't support a blanket prohibition on the act of circumvention, especially when no infringment has occurred. The way 1201 is being applied, ***any*** act of circumvention is prohibited, even though it, as stated in 1201(a)(1)(B), "shall not apply to persons ... adversely affected ... in their ability to make noninfringing uses ." In the so-called "DeCSS" case in New York, this law is being applied where no infringement has occurred, which is clearly having an adverse affect on non-infringing users, if not uses.

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As a professional electronics engineer, I am concerned that a legal "hands off" or a "you can't think this way" label applied to parts of programs, devices, or circuit schematics is an undue limitation imposed by the 1201 restrictions. Am I not allowed to study and discuss these methods or make my own equivalent methods? The "may not offer" provisions are being applied in ways that will limit discussion of functionality if there is a question of liability. Further, new product designs which may also have a circumvention capability are likely to run afoul of 1201. Adverse conditions to the engineering community are numerous, which is why I initially suggested to just exempt practically everything. There must be a way to achieve protection for the rights of copyright holders while not creating the far-reaching implications of a ban on a certain uses of technology.

In an attempt to understand the issues better, I have read most of the copyright law, news articles, chat bases, and court transcripts that pertain to this issue, searching for a position to balance the interests of all parties. As a result, I respectfully suggest that 1201(a)(1)(A) be worded, or at least interpreted in the courts, such that "and then infringes" is added. This simple addition would calm most of my concerns, and, I believe, the concerns of many others, because most of the vagueness is then removed. Although the rulemaking process was not empowered to reword the law, I believe that the report to Congress is an appropriate vehicle to suggest legislative changes, so it would not be improper to request clarification in that way.

At the risk of sounding extremist, I would like to offer an illustration of my thinking. While reading the opinions of others on this matter, I heard a facetious suggestion that, since strong encryption and decryption technology qualifies as a munition, our constitutional right to bear arms should allow one to possess tools of circumvention. I thought that to be a bit silly, but it brought to my mind what I believe was the intent of Congress when enacting 1201. Could it be seen as the intellectual property equivalent of the use of a weapon during the commission of a crime? It would be consistent, I suggest, with the existing laws for theft of physical property.

In the physical world, the use of a weapon during the theft of property increases the penalty imposed. It is important to note that possession of weapons themselves are specifically not prohibited, nor are many uses of weapons. I suggest that the same applies to the non-physical world of intellectual property. As circumvention methods also serve useful non-infringing purposes, I would like to point out a parallel. I believe that 1201 probably was intended to pertain only when infringement has occurred. In my opinion, rules to limit the study, creation, possession, and use of circumvention tools are otherwise problematic unless they are tied to actual acts of infringement. Just as possession of a weapon does not imply participation in a crime, neither does possession of circumvention tools imply participation in an infringing act. It cannot be assumed that an act of circumvention is followed by an act of infringement. I have a belief that it doesn't matter ***what you know***, but it does matter ***what you do*** with what you know.

I do not advocate theft of service, and I do not expect access to copyrighted works for no charge. It has been difficult, at times, to explain why I disagree with 1201 without sounding as if I support such things. It is circumvention as a crime all by itself that creates a problem in my mind. Although this may not be the most appropriate forum, my suggestion to balance the interests of copyright holders against the interests of end-users is this: Don't prohibit circumvention generally, nor is there a need to exempt any classes of works. Instead, to be consistent with law in the physical world, interpret violation of 1201 as being when a circumvention tool was used in the commission of an act of infringement.

Thank you,

Mickey McGown
mickeym@mindspring.com

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American Society of Composers, Authors and Publishers (ASCAP)

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
UNITED STATES DEPARTMENT OF CONGRESS

---x
In the Matter of :
:
: Docket No. 000522150-0150-01
Report to Congress Pursuant to : RIN 0660-ZA13
Section 104 of the Digital Millennium :
Copyright Act :
---x

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits these reply comments in accordance with the Notice of the Copyright Office and the National Telecommunications and Information Administration of May 16, 2000, 65 Fed. Reg. 35673 (June 5, 2000) announcing this request for public comment pursuant to section 104 of the Digital Millennium Copyright Act ("DMCA") on the effects of the DMCA and the development of electronic commerce on sections 109 and 117 of title 17 of the United States Code, and the relationship between emerging and existing technology and the operation of such sections.

ASCAP's Interest in this Proceeding.

ASCAP is the oldest and largest musical performing rights society in the United States with a repertory of millions of copyrighted works and more than 100,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organization around the world and licenses the repertories of those organizations in the United States.

ASCAP members, as creators and owners of copyrighted musical works, enjoy exclusive rights in those works as are granted under section 106 of the Copyright Act. These rights include the right to perform the works publicly, the right to produce the works in copies and the right to distribute such copies. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses only their non-dramatic public performance rights.

The types of users to whom ASCAP grants public performance licenses are wide and varying, and include, for example, television and radio broadcasters, hotels, nightclubs and college and universities. As new means of technology have been created to transmit music, ASCAP has sought to offer new forms of licenses appropriate to these mediums. Thus, as transmission of copyrighted musical works became possible over the Internet, ASCAP became the first performing rights organization to license these transmissions. Currently, ASCAP has entered licenses with the operators of well over a thousand web sites that perform copyrighted music.

As a licensor of performance rights, ASCAP's interest focuses on those comments that implicate directly or indirectly the section 106(4) exclusive right of performance. Most comments focus on the effects on sections 109 and 117. Numerous comments, however, directly or indirectly reach beyond sections 109 and 117 to other sections of the copyright law that are not presently under consideration. Such commentators are inappropriately using this proceeding as a forum to advocate legislative positions that would benefit their particular industry. For example, certain comments propose not only an extension of the first sale doctrine to distributions of electronic versions of copyrighted works made by means of transmission, but also advocate the right permanently to archive such materials – the latter being a subject of section 108. See Comments of the Library Associations.

More relevant to ASCAP, one commentator, the Digital Media Association ("DiMA"), suggests amending section 110(7), to extend to online sellers of copyrighted music the exemption that section provides to the section 106(4) right of performance. See Comments of the Digital Media Association at 21. DiMA is an association of operators of dozens of Internet web sites, many of which perform ASCAP music by way of transmissions. ASCAP has entered into performance licenses with many DiMA web sites and ASCAP's members are being compensated for the use of their music by the DiMA sites. DiMA's request to extend the section 110(7) license to web sites would effectively deprive ASCAP's members of their just compensation for the use of the copyrighted works; instead they would get a free pass for performances of music that ASCAP currently licenses. As set forth below, DiMA's comments regarding section 110(7) and all other comments advocating a limitation to the exclusive right of performance should not be considered (and, indeed, have no merit).

This Proceeding is Limited to a Study of Sections 109 and 117 and Comments Implicating Any other Sections of the Copyright Law Should be Ignored.

Congress, in enacting the DMCA, believed that emerging technologies might have effects on certain aspects of copyright law. Accordingly, the DMCA required the Copyright Office, either alone or with the Department of Commerce, to conduct studies and prepare evaluations on the interaction between emerging technologies and certain aspects of the copyright law. First, section 403 of the DMCA directed the Copyright Office to submit to

Congress recommendations on how to promote distance education through digital technologies while maintaining a balance between the rights of copyright owners and users. Second, section 1201(g)(5) directed the Copyright Office and Department of Commerce to report on the effects of the encryption research exemption on the prohibition on unauthorized circumvention of access control measures under section 1201(a)(1)(A). Finally, Congress directed the proceeding at hand to study the effects of the DMCA and electronic commerce on, and the relationship emerging technologies has with, sections 109 and 117.

Congress specifically limited the studies to only specific aspects of emerging technologies and copyright law. The study at hand, as noted by one commentator, was originally proposed as a general review of the copyright law and its relationship to electronic commerce. See Sec. 205(a), H.R. 2281 as originally reported. However, the House revised this provision, limiting the study to focus only on sections 109 and 117, the only two sections that Congress believed might require further evaluation due to emerging technologies and electronic commerce, and as revised it was passed into law. Accordingly, the Copyright Office and Department of Commerce were directed by Congress to limit their evaluation to the effects of the DMCA and the development of electronic commerce on sections 109 and 117 and the relationship between emerging technologies on sections 109 and 117.

Section 109, the "first sale doctrine" is a limitation on the section 106(3) right of distribution, and section 117 is a limitation on the section 106(1) right of reproduction. Neither section invokes or limits in any manner the right of performance – the only right which is the subject of section 110(7). Section 110(7) is therefore not under consideration and DiMA's comments relating to it and any other comments proposing to limit section 106(4), should be ignored.[1]

Section 110(7) Should Not be Expanded to Cover Internet Performances

DiMA's argument that the section 110(7) retailer exemption to the right of performance can and should be extended to online music retailer music businesses marketing and selling copyrighted music is not only inappropriate in this proceeding, but also has no merit. Section 110(7) is a limited exemption. It only applies if certain conditions are met: First, the exemption is limited to record stores – "vending establishments open to the public at large without any direct or indirect admission charge." Second, the purpose of the performance can only be to demonstrate the recordings being sold -- the "sole purpose" of the performance must be to promote the retail sale of recordings.[2] Third, the performance must occur at the physical place where the retail store is located (and in the department where recordings are sold) -- the performance must "not [be] transmitted beyond the place where the establishment [must be] located and is within the immediate area where the sale is occurring."[3]

DiMA is advocating a radical expansion of the exemption to allow Internet services which sell recordings to transmit performances of those recordings. Currently,

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[1] Some commentators advocate an amendment that would serve to preempt contractual license terms that limit use of a copyrighted work in any way. See Comments of the Library Associations at 23. ASCAP believes that such an amendment to Section 301(a) is not under consideration in this proceeding and would be completely inappropriate and unnecessary. Open and free voluntary licensing is the core of our copyright system. Indeed, ASCAP has entered into licenses with well over a thousand Internet web sites. Appropriate remedies for copyright misuse currently exist; legislative action as has been suggested is inappropriate.

[2] It should be noted that DiMA's comments misleadingly omit from the quotation of the language from section 110(7) the phrase "sole purpose."

[3] In 1998, the exemption was amended to include appliance stores that sold devices which played music, such as stereos, under the same conditions and limitations. Pub.L. No. 105-298, 112 Stat. 2827, 2830.

ASCAP licenses well over a thousand Internet web sites, including sites within DiMA's membership. Included within these sites are web sites that sell music files to the public and permit free sampling of such music (e.g. Emusic.com) as well as sites that supply such samples to the online retailers (e.g. Discovermusic.com). There is no justification for an expansion of the section 110(7) exemption to these web sites. Rather, it would be a "free pass" for those selling performances of music to avoid paying ASCAP's members, the creators and owners of the intellectual property from whom they were profiting.

The reason why Congress did not allow any exemption for transmissions of musical performances under section 110(7) applies with equal force to physical and "virtual" record stores: When a performance is given at a record store, it cannot be used by the store or the customer for any other purpose. The customer cannot "take" the performance away from the store, nor can the store profit from the performance in any way other than to demonstrate the sale of the record.

But just the opposite is true for a transmission of music on the Internet. Either by way of downloading or streaming the music, the "customer" can listen to the music at home, as a substitute for other means of performance, such as a broadcast radio station, an on-line audio Webcaster, or any other transmission entity which must pay performing rights fees to the creators and copyright owners of the music performed. There is nothing to stop a "customer" of a "virtual" record store from using the performances of music as a source of music without ever buying a record. In a physical record store, that possibility is meaningless, for the performance cannot be "used" away from the premises – and Congress, by refusing to extend the exemption to transmissions, insured that it would not be so misused. An "online" record store is, however, no different from a radio station. Indeed, there would be noting to prevent the "online" record store from benefiting from the performances without any sale of records; such benefits are routinely gained by sites so performing music (as, for example, a means of attracting "hits" from Websurfers to support advertising sales on the Website). Like a radio station, it should pay for the intellectual property it is using by performance.

Congress knew what it was doing when it refused to extend the exemption to transmissions. There is no good reason to allow expansion of that exemption now.

Conclusion

For the above reasons, the Copyright Office and the National Telecommunications and Information Administration should give no weight to DiMA's comments regarding section 110(7) and any other comments which indirectly or directly serve to limit the section 106(4) right of performance.

Dated: September 5, 2000

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Respectfully Submitted,

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Bryan Taylor

Reply Comment in Response to the Copyright Office Request for Comments on Sections 109 and 117 of the Copyright Act (June 5, 2000)

Federal Register: June 5, 2000 (Volume 65, Number 108)
Notices - Page 35673-35675

LIBRARY OF CONGRESS
The United States Copyright Office

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

This comment is filed by Bryan W. Taylor, an American citizen, as a private individual.

I would like to express my gratitude to the Copyright Office for affording the public the opportunity to provide input.

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General Reply Comments

There seems to be much unease in the words of several comments regarding the interaction of the DMCA with so-called "shrinkwrap" or "clickwrap" contracts. It should be noted that most courts who have considered such contracts have found them to be unenforceable, and nothing in the DMCA shouldchange this.

Only one Federal judge (Easterbrook of the 7th Circuit) has really held otherwise, and his opinion has been severely criticized by many authors. See Nimmer et. al Metamorphosis of Contract Into Expand 87 Calif. L. Rev. 17 Jan. 1999 for a masterful rejection of Easterbrook's preemption analysis from the foremost authority on copyright. Easterbrook's bizarre reasoning "money now, terms later" has not been followed by other courts. I prefer to call this "attack by offer", since as other courts have noted, you must expend resources to reject the offer, which equates acceptance to certain activities with your own property.

To every individual and organization, I hearby publicly notice this 'usewrap' contract offer: "By using or benefiting from any open source technology including but not limited to those that create the internet (sendmail, apache, bind, perl) you accept this contract: Notwithstanding licence restrictions stating otherwise, you provide overriding universal authorization to all third parties for all activities that would otherwise be allowed by fair use and/or first sale, including 'authorization' to decrypt works protected with access controls; as consideration I will make a donation to the Electronic Frontier Foundation sometime in the next year."

Besides the above reduction to the absurd, there are three lines of reasoning the force the rejection of clickwrap licenses: (1) the law of adhesion contract formation, (2) the supremacy of federal law over state contract law, and (3) misuse of copyright.

The following caselaw support these conclusions:

Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988)
Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991)
Arizona Retail Systems v. The Software Link, Inc., 831 F. supp. 759 (D. AZ 1993)
Novell v. Network Trade Center 25 F. Supp. 2d 1218 (C.D. Utah 1997)
Expeditors v. Official Creditors 166 F.3d 1012 (9th Cir 1999)
Lasercomb America, INC. V. Reynolds, 911 F.2d 970 (4th Cir. 1990)
DSC Communications. Corp. V. DGI Techs., 81 F.3d 597 (5th Cir. 1996)
Bobbs-Merrill Co v. Straus, 210 U.S. 339 (S. Ct. 1908)
Bauer & Cie. v. O'Donnell, 229 U.S. 1 (1913)
Motion Picture Patents Co. v. Universal Film Mfg. Co. 243 U.S. 502 (1917)

It should be noted that Vault v. Quaid rejected a shrinkwrap no reverse engineering clause in spite of explicit support by a Louisiana statue similar to the UCITA bill which most states are now tabling. (UCITA has passed only two states and Iowa passed a bill protecting it's citizens from other states enforcement of UCITA).

Judge Green put it best in Novell v. Network Trade Center:

> Most courts that have addressed the validity of the shrinkwrap license have found them to be invalid, characterizing them as contracts of adhesion, unconscionable, and/or unacceptable pursuant to the U.C.C. Step-Saver, 939 F.2d 91; Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988); Rich, Mass Market Software and the Shrinkwrap License, 23 Colo. Law. 1321.17 A minority of courts have determined that the shrinkwrap license is valid and enforceable. See, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996); Microsoft v. Harmony Computers, 846 F. Supp. 208, 212 (E.D.N.Y. 1994).
>
> This Court holds that transactions making up the distribution chain from Novell through NTC to the end-user are "sales" governed by the U.C.C. Therefore, the first sale doctrine applies. It follows that the purchaser is an "owner" by way of sale and is entitled to the use and enjoyment of the software with the same rights as exist in the purchase of any other good.

We can now add judge Kaplan and Universal v. Reimerdes to the list of "minority of courts". He called such notions of First Sale "sophistry", without giving any citation at all and without acknowledging the existence of section 117 or of 109 of the copyright act. It is especially interesting that Kaplan does not even mention 17 USC 109(c) which states precisely that First Sale communicates the right to display to those present where the physical copy is. Nor does he cite the opinions of his peers like the one above. Sophistry indeed!

The idea that first sale does not apply to software because it is "licensed" is resoundingly refuted by Nimmer in Metamorphosis who traces it's etymology in footnote 84:

> It is instructive to undertake some archaeological excavation into the myth that a separate "licensing" paradigm exists. One student commentator maintains that "if the software is only licensed, then the software developer may prevent the user from transferring ownership in a copy to a third party." Ira V. Heffen, Note, Copyleft: Licensing Collaborative Works in the Digital Age, 49 Stan. L. Rev. 1487, 1499 (1997). As support, the Note cites the current case of Microsoft v. Harmony and traces its genealogy back to a handbook published by the Practicing Law Institute. See id. at 1494 n.37 (citing William H. Neukom & Robert W. Gomulkiewicz, Licensing Rights to Computer Software, in Technology Licensing and Litigation 1993, at 778 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3897, 1993), available in WESTLAW, 354 PLI/Pat 775). The authors of that PLI handbook serve as Senior Vice President for Law and Corporate

> Affairs and Senior Corporate Attorney, respectively, with Microsoft Corporation. They explain "that software publishers license rather than sell software in order to negate the doctrine of first sale...." Id. One must congratulate their employer on realizing, in Microsoft v. Harmony, its goal-conceded with admirable candor - of voiding copyright's first-sale doctrine. Nonetheless, for the reasons set forth in the text, the statute itself does not permit that result, to the extent that the underlying essence of the transaction results in a user obtaining ownership of the physical product containing the copyrightable expression.

However, one should note that, true to form, Microsoft did not innovate, but rather embraced and extended the idea of using a "license" to eradicate first sale rights. Nearly a century ago Supreme Court dicta taught us "to call the sale a license to use is a mere play upon words" Bauer & Cie.v. O'Donnell, 229 U.S. 1 (1913). Microsoft has merely rehashed a tired and sorely refuted idea.

Reply Comment to Ken Wasch of SIIA

Ken Wasch of the SIIA writes:

<quote>

With regard to section 117, our only general comment relates to the public perception and interpretation of the section 117 exception. All to often, we have become aware of persons engaged in software and content piracy who are using section 117 as the justification for their actions. For instance, we have come across numerous people who attempt to auction off their so-called back-up copies of their computer software or who make pirate software available on websites, ftp sites or chat rooms under the guise of the section 117 back-up copy exception.

One need look no further than the testimony of Robin Gross of the Electronic Frontier Foundation during the 1201(a)(1) rulemaking as evidence of the misunderstanding of the scope and effect of section 117. In her testimony, she claimed to have the right to make a back-up copy of a DVD for personal use, but when asked for the legal basis for her claim, she stated that she was unfamiliar with section 117.

MR. CARSON: What other fair uses of a DVD can't engage in under the current regime?
MS. GROSS: If I want to make a back-up copy for my own personal use.
MR. CARSON: Okay. Let's stop with that. What case law tells you that you have a fair use right to make a back-up copy of the DVD for your own personal use?
MS. GROSS: I think that Sony v. Universal Citiessays that.
MR. CARSON: Really? That's an interesting proposition.
MR. MARKS: I don't think Sony says that.

MS. GROSS: Software law specifically allows you to do that, and DVDs certainly fall under software.
MR. CARSON: DVDs fall within Secion 117, is that what you're saying?
MS. GROSS: DVDs are software.
MR. CARSON: Okay. Are you saying that they're covered by Section 117?
MS. GROSS: I'm not really sure what 117 is.
MR. CARSON: Okay. You might want to take a look at it, and let us know in your post -hearing comments.

</quote>

Reply:

First, the statue:

117 Limitations on exclusive rights: Computer programs

(a) Making of Additional Copy or Adaptation by Owner of Copy.- Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Mr. Wasch makes a reasonable comment about care being required for interpretation of the section 117 exception. We can all believe that piracy is sometimes committed under the smoke screen of these sections. Nothing in 117 authorizes trading of archival copies, and in fact archival copies must be "destroyed" if the possession ceases to be rightful, and such copies can be "for archival purposes only".

Next, however, Mr. Wasch proceeds to attack Ms. Gross of the EFF on a completely unrelated matter. The transition is a non sequitur. Ms. Gross is not advocating claiming 117 protection to trade works. While 117 does not support piracy, neither does Ms. Gross, and her comments are in fact technically correct. Even if she was unfamiliar with section 117, it clearly supports her point.

Moreover, she refers to "software law" and cites Sony v. Universal Studios. Both references do lend support the assertion that a consumer has a "fair use right to make a back-up copy of the DVD". Moreover, 117(a)(2) explicitly supports this. It is a shame that Ms. Gross did not simply answer "Yes" when asked if DVD's are covered by section 117. Mr. Wasch does not even argue the point that she was wrong, but seems to merely revel in the fact that Ms. Gross, when put on the spot, was unable to recall the specifics of the statue that does in fact support her position.

First of all, the holding in Sony states "Any individual may reproduce a copyrighted work for a 'fair use'; the copyright owner does not possess the exclusive right to such a use." It continues that the test for a device capable of creating copies is 'commercially significant noninfringing uses'. Citing Sony, the district Court in Vault v. Quaid, 655 F. Supp. 750 (E.D. LA 1987) denied a claim of copyright infringement against copyprotecton defeating software. "The Court concludes that Quaid has met its burden of bringing itself within the § 117 archival exception. CopyWrite is capable of 'commercially significant noninfringing uses.'" It appears that Judge Heebe disagrees with Mr. Marks assertions, and does believe that 'Sony says that'. Thus 'software law' and Sony do support archival copies of DVD's if a DVD is software, as Ms. Gross asserts.

Of note, a separate issue in this case found a contractual reverse engineering prohibition preempted under Copyright law, despite Louisiana's adoption of a predecessor to UCITA. This finding was appealed and affirmed by the 5th Circuit 847 F.2d 255 (5th Cir. 1988), and clearly provides part of the foundation for the reverse engineering exception embodied by Congress in 1201(f). This is closely related to the concept of misuse of intellectual property.

Mr. Wasch started out with the desire for greater education with regard to section 117. He cites public misunderstanding with regard to what you are allowed to do with computer programs under the statute. Ironically, he falls into a common misunderstanding on the interpretation of this very section with regard to what constitutes a computer program. While Mr. Wasch chastises Ms. Gross for not being studied on 117, he himself seems to overlook the very broad definition of computer program that has been adopted by Congress as the last sentence of 101. It seems that smoke screens are used by both sides to avoid correct 117 analysis. A DVD is clearly a "computer program" under the definition set forth in the Copyright Act (17 USC 101):

> A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

There is a common public misconception that a DVD is no different than a VCR tape. Some people mistakenly believe that a DVD merely contains the digitized pictures of the movie. This is demonstrably false. In fact, there are at least three different types of software instructions used on DVD's that qualify it for

117 exemption status.

First, the menu structure and navigation commands are present on the DVD. These commands are there to "mark-up" the video and synchronize the sound. These are exactly analogous to HTML, the programming language for web-page markup, see Actonet v. Allou Health & Beauty, 99-1855, (8th Cir. 8/1/00). These commands must be created with specialized DVD "authoring" programs such as DVDMotion. For example, see http://store.yahoo.com/dvd4u/dvdmotionpage.html . The command language is so rich that the video game "Dragon's Lair" has been successfully created in it, using the same commands available to any DVD movie, see http://www.yanman.com/HomeTheater/Reviews/DragonslairReview.htm for a review. Note that this game is played on an ordinary DVD player, and controlled using nothing but "using the DVD player remote".

Second, the technological protection measures on DVD's are clearly computer programs. These implement the encryption, and keys management, in a three tiered structure of player keys, disk keys, and title keys. The disk and title keys stored on the DVD, and are clearly part of the computer programs intended to 'bring about [the] result' that access to the specific movie occurs with the authority of the copyright holder (ie after First Sale). While much of this functionality lies off the DVD in the player program, not all of it does. The part on the DVD qualifies it for 117 protection, and also allows the reverse engineering for interoperability of DVD's under 1201(f).

Finally, compression technologies are used to reduce the storage space the movie requires. For DVD's, video is compressed in the MPEG-2 standard, while sound uses AC-3. Compression consists of software instructions that describe how to recreate the picture or sound instead of providing the picture directly. The compression instructions are used to guide the computer through the reconstruction of a "lossy" copy of the 'as recorded' digital movie.

So, indeed, a DVD clearly contains computer programs that qualify for the archival exception under section 117(a)(2), just as Ms. Gross asserted.

Broadcast Music, Inc. (BMI)

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
U.S. DEPT. OF COMMERCE
Washington, D.C.

In the Matter of

NOTICE OF INQUIRY REGARDING
SECTIONS 109 AND 117
OF THE U.S. COPYRIGHT ACT

Docket No. 000552150-0150-01

REPLY COMMENTS OF BROADCAST MUSIC, INC.

On May 16, 2000, the U.S. Copyright Office ("Office") and the National Telecommunications and Information Administration ("NTIA") issued a Notice of Inquiry in the above-referenced rulemaking proceeding to request written comments from interested parties in order to elicit information and views on the effect of electronic commerce on the operation of sections 109 and 117 of the U.S. Copyright Act (the "Act"), in accordance with Section 104 of the Digital Millennium Copyright Act of 1998 ("DMCA"). See 65 Fed. Reg. 35673-75 (June 5, 2000) ("Notice"). See also Pub. L. No. 105-304, 112 Stat. 2860 (1998). The Notice provides that the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce are to issue a report to Congress with respect to the relationship between emerging technology and the operation of these statutory sections. On or before August 4, 2000, numerous parties submitted initial comments.

These reply comments are submitted on behalf of Broadcast Music, Inc. ("BMI"). BMI's comments primarily address the comments of the Digital Media Association ("DiMA") and The Home Recording Rights Coalition ("HRRC") and others who are proposing unwarranted new exemptions in the copyright law affecting music licensing.

BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its 250,000 affiliated songwriters, composers and publishers, as well as thousands of foreign works through BMI's affiliation agreements with over sixty foreign performing right organizations. BMI's repertoire is licensed for use in connection with performances by over a thousand Internet web sites, as well as by broadcast and cable television, radio, concerts, restaurants, stores, background music services, sporting events, trade shows, corporations, colleges and universities, and a large variety of other users.

In the initial comments three amendments to the Act were proposed that would, if adopted, adversely affect the interests of copyright owners. All three of these amendments should be recognized for what they are: efforts by music-using new media entities to preempt the legitimate commercial interests of music copyright owners in an evolving marketplace. DiMA and HRRC offer no evidentiary support for their arguments, and it is doubtful whether their proposals would be compatible with either the Berne

Convention or the WIPO Copyright Treaty. BMI therefore supports the comments of the Copyright Industry Organizations ("CIO") that no changes to Sections 109 and 117 are required, and further urges the Office and the NTIA to reject DiMA's invitation to amend Section 110(7) of the Act. In any case, whatever is done concerning the first sale doctrine must not affect the public performing right in digital transmissions of musical works.[1]

I. The First Sale Doctrine Should Not Be Expanded to Digital Transmissions.

BMI is concerned that if Congress were to enact an exemption to the distribution right in Section 106(3) of the Act for digital transmissions of musical works, such an exemption would be claimed by users to cover all other copyright rights in the "exempt" transmissions, including the right of public performance. As stated above, BMI does not support an expansion of the first sale doctrine. However, should the first sale doctrine be extended in any way, such extension must expressly provide that it in no way affects the public performing right in such transmissions.

Today, digital networked transmissions on the Internet for downloading are different from distributions of physical media because they implicate more copyright rights -- including the public performing right, the public display right and the reproduction right in addition to the distribution right. As copyright owners point out, digital transmissions by downloading invariably result in a reproduction retained by the recipient. CIO Comments at 4. This is so whether the sender keeps his or her copy or discards it. Moreover, the Internet permits multiple copies to be sent simultaneously by the sender to different recipients. Time Warner Comments at 1. As the copyright owners point out, reproduction rights are not exempted by the first sale doctrine. Id.

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[1] This includes musical works embodied in sound recordings, audiovisual works or multimedia works.

Digital transmissions on the Internet when made to the public also constitute public performances of the underlying musical works under Section 106(4) of the Act. For example, when a Napster user makes his or her music collection available to the public for downloading without authorization of the copyright owners, the copyright owners' public performance rights in those songs are implicated.[2] The first sale doctrine in Section 109 does not apply to the public performing right. 2 Nimmer § 8.12[D]. Such transmissions require public performing rights licenses. The first sale doctrine should not be extended to digital transmissions if doing so would adversely impact the public performing right in musical works in any way.

When Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Congress clarified the applicability of the mechanical compulsory license to digital phonorecord deliveries. In so providing, it preserved the applicability of the public performing right to digital transmissions. 17 U.S.C. § 115(d).[3] In reviewing the DPRA, Nimmer observes that "the prudent course would seem for purveyors of the new digital services to pay royalties under both theories [i.e., performance and mechanical]. Perhaps, sub rosa, that is the intent underlying this legislation." 2 Nimmer § 8.24[B]. See also Kohn on Music Licensing (Second Edition) 1999 Supplement at page 101 ("Under current law, in our view, all transmissions constitute either a performance or a display (some of which may be to the public).") (emphasis in original).[4]

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[2] The court confirmed the "public" nature of the activities of Napster users in a case involving reproduction rights. A & M Records, et al. v. Napster, Inc., No. C99-5183 MHP (N.D. Cal.), Slip op. at 20, 2000 U.S. Dist. LEXIS 11862 (p. 16) ("Sampling on Napster is not a personal use in the traditional sense that courts have recognized…"); preliminary injunction issued by district court stayed, 2000 U.S. App. LEXIS 18688 (9th Cir. 2000).

DiMA's proposed exemption covering digital transmissions is based primarily on an argument for "consumer convenience." DiMA Comments at 13. When presented with similar fair use arguments about "space shifting" music, federal courts have rejected such arguments. For example, in granting an injunction against MP3.com, the Southern District of New York stated: "Copyright… is not designed to afford consumer protection or convenience but, rather, to protect the copyrightholders' property interests." UMG Recordings, Inc., v. MP3.com, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

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[3] See also 17 U.S.C. § 115(c)(3)(K) ("Nothing in this section annuls or limits (i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of digital transmission...."). The Copyright Office regulations reflect the statute in this regard. See 37 CFR § 255.8.

[4] In a recent decision the Second Circuit confirmed that each step in the process by which a protected work wends its way to its audience constitutes a public performance. NFL v. PrimeTime 24 Joint Venture, 211 F.3d 10 (2d Cir. 2000). Moreover, Section 101 of the Act states that it does not matter whether members of the public receive the transmission in the same place or in separate places, or at the same time or at separate times. 17 U.S.C. § 101 (definition of perform "publicly"). Transmissions to a single person (including on demand transmissions) therefore can be public performances under the Act. See, e.g., On Command Video Corp. v. Columbia Pictures Industries, 777 F. Supp. 787 (N.D. Cal. 1991); see also WIPO Copyright Treaty, Art. 8 ("making available right").

DiMA and HRRC premise their arguments for this new exemption on the fear that e-commerce in music will be stunted without legislative "clarity" on the scope of the first sale limitation. DiMA Comments at pp. 2-3; HRRC Comments at 3. DiMA's comments in this proceeding contain little evidence to support this claim. DiMA itself observes that there has been an explosion in webcasting since DiMA submitted its congressional testimony in 1998 and since the Ashcroft and Boucher-Campbell bills were first proposed. DiMA Comments at pp. 1-2 and 4-6. It cannot be denied that the Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files.[5] Yet, even in the face of this rampant piracy, Jupiter Communications reports digital downloads are expected to result in a $1.5 billion commercial market by the year 2005 (DiMA Comments at 7), notwithstanding the different treatment in the

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[5] Napster Slip op. at 37, 2000 U.S. Dist LEXIS 11862 (p. 26) ("Any destruction of Napster, Inc. by a preliminary injunction is speculative compared to the statistical evidence of massive, unauthorized downloading and uploading of plaintiffs' copyrighted works - as many as 10,000 files per second, by defendant's own admission").

Act for digital embodiments. Accordingly, it is hard to make a factual case that Section 109 is inhibiting digital transmissions.

DiMA attempts to buttress its argument for an expansion of Section 109 with claims that new digital rights management (DRM) tools will soon enable copyright owners to transmit secure, encrypted files that will protect against unauthorized multiple copying by consumers. In fact, DiMA claims that passing a copyright exemption will force owners to create better DRM tools that ensure deletions of users' files, or that transfer encryption keys along with files. DiMA Comments at 7. This is scant comfort to copyright owners, as DRM tools are at a nascent stage of development and not yet in widespread use in the market. Moreover, when owners do implement encryption tools such as DeCSS, they are susceptible to being hacked. See Universal City Studios, et al. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000)

In summary, while it is clear that there is a strong demand for music online, it is not yet known which of several business models will emerge as commercially viable. In these circumstances, it seems at a minimum quite premature to consider enacting a new copyright exemption to the distribution right that would affect the online music delivery market at this time. Indeed, the Berne Convention and the WIPO Copyright Treaty require that the market be given an opportunity to develop. These treaties prohibit limitations on copyright that interfere with copyright owners' legitimate business opportunities, whether they are established licensing practices or prospective in nature. Accordingly, the proposal to extend Section 109 to digital transmissions should be rejected. It is of critical importance that in the event that some action is taken to extend the first sale doctrine to digital transmissions it must not affect the public performing right in digital transmissions of musical works.

II. Section 117 Should Not Be Amended to Exempt the Reproduction Rights in Streaming Music

DiMA's second proposed amendment -- to Section 117 of the Copyright Act -- involves exempting the reproduction right in streaming media, where a portion of the material is captured in a temporary "buffer" at the user's computer. BMI agrees with the CIO comments that no change to Section 117 is warranted at this time. Section 117 has nothing to do with the broadcasting of music and any attendant reproduction rights issues, and there is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music or broadcasting-related issues on the Internet. In view of the explosion of webcasting since 1998 cited by DiMA, it is difficult to see how a brand new exemption is necessary to foster webcasting over the next several years. The Office and the NTIA should therefore decline the DiMA's invitation to address these matters in the context of this proceeding.

III. The Record Store Exemption in Section 110(7) Should Not Be Extended to Online Record Stores.

DiMA inappropriately exceeded the scope of this DMCA inquiry by suggesting that Section 110(7) of the Act must be amended to "clarify" that it applies to online music "stores" (DiMA Comments at 21), and the Copyright Office should not consider this proposal for a new exemption to the public performing right in this proceeding. As DiMA's comments reveal, Section 110(7) clearly has no application whatsoever to Internet uses. As currently in effect, it is limited to brick and mortar establishments. This exemption in the Act provides a limitation on the copyright owner's exclusive right in a very specific context. The only time an exempted performance can be given is to promote the retail sale of a phonorecord at a "vending establishment…without any direct or indirect admission charges…". Furthermore, the performance cannot be "transmitted beyond the place where the establishment is located". Under DiMA's amendment, the location of the establishment would be co-extensive with the Internet itself - i.e., *the world.*

In addition, as currently written, for the exemption to apply the sole purpose of the performance must be to promote the retail sale of copies or phonorecords of the work, or of the audiovisual, or other devices utilized in such performances. 17 U.S.C. § 110(7). If, as in Chappell & Co. v. Middletown Farmers Market and Auction Co., 334 F.2d 303 (3d Cir. 1964), there is a dual purpose of sales promotion and entertainment, Section 110(7) would not protect the user in any event. BMI contends that "online record stores" have dual entertainment and promotion purposes that are prohibited under Section 110(7).

Furthermore, virtually all web sites with music can provide links to record retailers like CD Now and can claim that their music is "related" to the promotion of a sale. BMI believes that licensing music rights online is a more appropriate solution to the issue raised by DiMA. For example, BMI currently licenses a music service which provides music clips to online record stores, and this market would be disrupted (if not outright lost) if DiMA's exemption were to be enacted. Accordingly, the Office and the NTIA should reject the DiMA proposal on both procedural and substantive grounds.

IV. CONCLUSION

The exemptions sought in Sections 109, 117 and 110(7) of the Act should be rejected at this time. BMI looks forward to working with the Office and the NTIA to assist them with their statutory directive, including testifying on these issues, and also looks forward to monitoring developments in the area of emerging technologies and their impact of various aspects of U.S. copyright law.

Respectfully submitted,

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Arnold G. Reinhold

Reply to comments of Przemek Klosowski, Ph.D. on the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, (``DMCA") and the development of electronic commerce on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of such sections.

Dr. Klosowski writes: "...the anti-circumvention rule does not protect IP---it is already protected by the previous law. Instead, DMCA protects the control of delivery of IP. For instance, the content brokers can prevent the consumer from fast-forwarding over commercial advertisements included in the IP that the consumer purchased."

I support Dr. Klosowski's position, but I believe that there is much more at stake here than preventing consumers from fast-forwarding over commercials. The technical protection measures that DCMA addresses can also be used by foreign governments to prevent unwanted content from being viewed by its residents. This is the digital-millennium equivalent of the jamming of Radio Free Europe during the Cold War. An attempt by a US Citizen to bypass those measures, for example by buying a DVD movie about Tibet and re-coding it so that it is playable by a Chinese-zoned DVD player, could be prosecuted under DCMA as an act of circumvention. The tools for producing such a re-coded DVD are similarly proscribed under this law, as interpreted by its supporters and US district Judge Kaplan.

Here is the testimony of Dean Marks, Senior Counsel, Intellectual Property for Time Warner, given at the Stamford Library of Congress hearing on DCMA (transcript page 262):

> MR. MARKS: Another reason why we need
> regional coding, why we do regional coding is that
> the law in various territories is different with
> regard to censorship requirements. So we cannot
> simply distribute the same work throughout the world
> in the same version. Local laws impose censorship
> regulations on us that require us to both exhibit
> and distribute versions of the films that comply
> with those censorship requirements.

The DCMA makes violations of the censorship laws of every dictatorship in the world enforceable against US Citizens in US Courts. This violates the "first sale" doctrine and is an outrage in a country that professes to promote freedom throughout the world.

Respectfully submitted,

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September 5, 2000

National Music Publishers' Association

UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
AND THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE

In Re Request for Public Comment)
In Preparation for Report to)
Congress Pursuant to Section 104 of)
The Digital Millennium Copyright)
Act)

Docket No. 000522150-0150-01

SUPPLEMENTAL REPLY COMMENTS OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association, Inc. ("NMPA") submits these supplemental Reply Comments pursuant to the Notice of the Copyright Office and the National Telecommunications and Information Administration in the above-referenced matter, initiated June 5, 2000, 65 Fed. Reg. 35673.

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. NMPA's wholly owned subsidiary, The Harry Fox Agency, Inc., acts as licensing agent for more than 26,000 music publishers, who in turn represent the interests of hundreds of thousands of songwriters. The Harry Fox Agency acts on behalf of its publisher-principals in connection with licensing the Internet distribution of music, as well as other, more traditional uses of music in recordings, motion pictures and other audiovisual productions.

NMPA has participated in this inquiry by filing joint Comments and Reply Comments along with the American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Motion Picture Association of America, and the Recording Industry Association of America (hereinafter "Copyright Owners Comments" and "Copyright Owners Reply Comments"). We fully support those filings. We wish to offer these additional comments on several points raised by other parties in the initial round, to the extent that those comments have particular bearing upon the interests of music copyright owners and creators.

As a preliminary matter, NMPA notes that several commentors[1] in the initial round have urged the expansion of limitations on rights of copyright owners in connection with sections 109 and 117 of the Copyright Act. In general, the very legislative proposals advocated by these groups (or substantially similar proposals) were considered by Congress during deliberations leading to enactment of the Digital Millennium Copyright Act ("DMCA") and rejected. The history of Congress's consideration of these failed attempts to amend sections 109 and 117 is discussed at some length in the Copyright Owners Comments and Copyright Owners Reply Comments. We will not repeat that history here. But suffice it to say that, in evaluating "the relationship between existing and emerging technology and the operation of [sections 109 and 117]" – Congress's charge to the Copyright Office and the NTIA -- little has happened in the past 24 months to alter Congress's calculation that no legislative expansion of either of these sections is warranted. To the contrary, changes in technology and emerging business models have served to confirm Congress's prudence in making only the limited adjustments in the law contained in the DMCA at the time of its enactment.

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[1] NMPA refers principally to the comments of the Digital Media Association, the Home Recording Rights Coalition and the Digital Future Coalition.

Section 109

Copyright law has long distinguished between the ownership of an intangible copyrighted work, and the ownership of a tangible copy or phonorecord of that work. When a tangible copy or phonorecord of a work – e.g. a CD or cassette tape – is sold, the "first sale doctrine," codified in section 109 of the Copyright Act, allows the purchaser of that tangible copy to dispose of it as he or she sees fit.

The Digital Media Association ("DiMA"), the Home Recording Rights Coalition ("HRRC") and the Digital Future Coalition ("DFC") urge the adoption of a wildly expansive view of the very limited first sale doctrine. These groups recommend that the doctrine be expanded to allow persons arguably in lawful possession of a copy of a work to transmit that work to another, without limitation, in order to ensure the enjoyment of what they call "full first sale doctrine rights."[2] The very nature of the electronic transfer of copies described by DiMA and its allies implicates not only the exclusive distribution right of the copyright owner, to which the limited privilege in section 109(a) attaches, but also many of the other exclusive rights of the copyright owner established in section 106 of the Copyright Act. The attempt to shoe-horn activities that involve, at a minimum, the reproduction and public distribution of works into the very narrow limitations of section 109(a) flies in the face of both the letter and intent of the fist sale doctrine.

As Professor Nimmer summarized:

> It should be made clear that the one who is entitled to claim the benefit of Section 109(a) is not thereby exempted from the thrust of any rights of the

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[2] See, e.g., Comments of the National Association of Recording Merchandisers and Video Software Dealers Association at 12.

> copyright owner other than the distribution right. This follows from the fact that Section 109(a) merely authorizes "the owner of a particular copy or phonorecord … to sell or otherwise dispose of the possession of that copy or phonorecord." This is, in effect, an authorization to distribute. It does not authorize reproduction, adaptation, or performance. Moreover, Section 109(a), by its own terms, merely creates an immunity "notwithstanding the provisions of section 106(3)," *i.e.*, the distribution right. It does not purport to create an exemption *vis-à-vis* the other Section 106 rights.[3]

DiMA and its supporters claim a "digital first sale doctrine" is necessary to avoid discrimination against "digitally-acquired media."[4] But what these groups really seek is not a "digital first sale doctrine," but rather a new, broad exemption from all rights of the copyright owner, which bears little resemblance, in scope or purpose, to the first sale doctrine as it exists today. As one commentor pointed out in the initial round,

> When phrases like "digital first sale doctrine" are used, at least by some, the intent is not an application of the first sale doctrine to digital works, but a wholesale expansion of the first sale doctrine in derogation of the rights of copyright owners. To take a newsworthy example, when the owner of a lawful copy of a CD "rips" a song into a digital MP3 file and then transmits that file to one or more friends, the first sale doctrine cannot be invoked to provide legal justification for the reproduction involved and the multiple resulting copies. And the first sale doctrine is hardly applicable when, in the Napster-type context, an individual makes copies available around the world, thus engaging in public distribution of the works involved.[5] (Emphasis in original.)

A close reading of the initial round comments reveals the scope of the exemption contemplated by some. For example, the joint comments of the National Association of Recording Merchandisers ("NARM") and the Video Software Dealers Association ("VSDA") strongly suggest that these organizations and their members believe that the first sale privilege attaches not only to a purchased copy, but also to any copy of the purchased copy made pursuant to a license agreement (for backup or for other purposes), regardless of the limitations on the use of such additional copies agreed to under the terms of the license. Thus, as envisioned by NARM-VDSA, a purchaser of a single copy or phonorecord of a work, who along with that copy purchases the right to make two additional copies for a specified purpose, should – by operation of the first sale doctrine – have the right to keep one copy and distribute the other two.[6] Such a result would open a digital floodgate of unauthorized distribution of copyright music and greatly hinder the efforts of music publishers to establish economically rational licensing relationships and business models for existing Internet uses, as well as those to come.

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[3] M. NIMMER AND D. NIMMER, NIMMER on Copyright Sec. 8.12[D].

[4] DiMA Comments at 9-10.

In carrying through with Congress's mandate to assess the impact of new technologies on the operation of section 109, we urge the Copyright Office and NTIA to consider the impact that the legislative expansion advocated by DiMA and its allies would have on the ongoing efforts of music and other copyright owners to curb widespread piracy through so-called "file sharing" services and software. An expanded reproduction/distribution privilege of the type advocated by these groups would do little more than give Napster and others of its kind a legal shield for their predatory practices. And the impossibility of enforcing a legal mandate to delete one's own copy of a protected work when a copy of that work is forwarded to another would be sure to cause many consumers – some of whom already wrongly believe that they have a "right" to copy protected works – to believe that they also have a "right" to distribute those works to the public.

NMPA joins other copyright owner associations in vigorously opposing the legislative language expanding the first sale doctrine proposed by DiMA and its allies. As the Copyright Owners Reply Comments make clear, the proposal these groups

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[5] Time Warner Comments at 1.

[6] See NARM-VSDA Comments at 19-20.

advocate was considered and rejected by the 105^{th} Congress in enacting the DMCA. The Copyright Owners Reply Comments further show the flaws inherent in DiMA's suggestion that developments in digital rights management technologies provide justification for taking the step Congress declined to take 23 months ago. Copyright owners are eagerly embracing and experimenting with a variety of rights management technologies as a means of facilitating licensing and tracking uses of works, for the shared benefit of rights owners, commercial users of works and consumers. It is not yet clear, however, which technologies will prove most effective or which will stand the test of the marketplace (both in terms of their impact on cost and general ease of use by the consumer). But the decision as to whether to employ a rights management technology or which such technology to employ – at a time at which both the market and technology are developing rapidly – is best left to rights owners and the customers they serve.

NMPA urges the Copyright Office and NTIA to proceed, as Congress did, with caution. We urge rejection of any recommendation that would create a dangerous loophole in the law that could be manipulated by commercial predators seeking to avoid the obligation to license the uses of music and other copyrighted works that they exploit.

Section 117

NMPA fully supports the Copyright Owners Reply Comments in their criticism of the suggestions of some organizations to expand section 117 to cover temporary or incidental digital copying. These suggestions are in fact a surreptitious attack on the exclusive reproduction right with respect to all works, not just computer programs, and should be rejected. We wish to draw particular attention to the comments of DiMA, which quotes its own congressional testimony from June 1998 that:

> Hundreds of thousands of hours of audio and video material now are available over the Internet. "Streaming media" technology is essential to making these Internet transmissions sound as smooth as over the radio . . . .
>
> If temporary RAM copies of those few seconds of material are deemed to be copyright infringement, and streaming media performances and technology could therefore be deemed unlawful, audio and video over the Internet will come to a grinding halt.[7]

Similar arguments are made by the HRRC.[8] The quoted passage proves that an amendment to section 117 is unnecessary. DiMA issued the dire warning about "audio and video over the Internet" coming to "a grinding halt" more than two years ago. As NMPA and its members can testify from their own experience, and as the general public can clearly observe, audio over the Internet today is flourishing and will expand. DiMA's dire warnings were wrong. Its expansive suggestion that "section 117 of the Copyright Act should exempt archival and temporary copying for digital media" was without justification in 1998 and it is without justification today.

In addition, DiMA asserts that "the exemption from the reproduction right is all the more warranted for webcasting, where the same copyright owners of the musical composition, audiovisual work or the sound recording already will have authorized, and been compensated for, the performance of the works."[9] This statement implies that respect for the right granted in section 106(4) (the public performance right) should exempt a party from any responsibility or any liability with regard to the other rights granted under sections 106(1) (the reproduction right), 106(3) (the distribution right) or any other portion of section 106. Decades of well-settled law establish that the rights in each clause of section 106 are separate and distinct. As such, they are separately licensable. DiMA's suggestion otherwise is either a gross misreading of copyright law or a deliberate attempt to confuse. In either case, there is no reason or basis to read or amend section 117 to effect such a dramatic change in copyright law.[10]

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[7] DiMA Comments at 17.
[8] HRRC Comments at 6.

Finally, DiMA asserts that:

> The scope of the temporary copying exemption, as relevant to Internet webcasting, reappeared on the radar screen in December 1997. Three Internet webcasters -- AudioNet, Inc. (now Yahoo!/broadcast.com), RealNetworks, Inc. and Terraflex Data Systems, Inc. (now Spinner.com, which is owned by America Online, Inc.) -- opposed the adoption of a broadly-worded rule, jointly proposed to the Copyright Office by the National Music Publishers Association and the Recording Industry Association of America, that could have applied the reproduction right (and the mechanical royalty at the statutory rate) to these temporary RAM buffer copies. Eventually, that language was withdrawn from the proposed regulation and the issue was deferred until the next arbitration period.[11]

This assertion is just plain wrong. The joint NMPA-RIAA submission proposed a ***rate*** for incidental digital phonorecord deliveries under section 115. That proposal contained no "broadly-worded rule," said nothing about "temporary RAM buffer copies," and did not purport to define the scope of the statutory term "incidental" digital phonorecord delivery. The opposition was filed by the Association of Internet Webcasters, which opposed the rate jointly proposed by NMPA and RIAA for incidental digital phonorecord deliveries ("DPDs") and argued that streaming audio should not be treated as an incidental DPD (an issue that was not properly before the Copyright Office). NMPA and

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[9] DiMA Comments at 20.

[10] Nor are DiMA members in any way burdened by the necessity of obtaining licenses from more than one licensing entity. In a business structure that exists worldwide, music publishers license "mechanical" and public performance rights separately, typically through separate (although sometimes related) collectives. This structure serves the interests of the businesses that require licenses as well as those of songwriters and copyright owners. It eliminates the need to search out and identify individual copyright owners in a business in which the number of rights owners is in the tens of thousands, and the number of works in the hundreds of thousands.

[11] DiMA Comments at 17.

RIAA ended up deferring the incidental rate until the next rate proceeding. The general DPD rate that had been jointly proposed was then adopted without opposition. In short, the scope or definition of "temporary RAM buffer copies" has never been at issue in a DPD proceeding, and the webcaster submission described above is certainly not germane to the current study involving section 117.

Expansion of the Retail Store Exemption

In a proposal far afield from the scope of issues Congress has asked the Copyright Office and the NTIA to review in connection with this study, DiMA asks that the existing "retail store" exemption contained in section 110(7) of the Copyright Act be expanded to extend to online retailers. In NMPA's view, such an expansion is unnecessary and unwarranted.

Section 110(7) allows stores that sell compact discs and tapes to publicly perform the music they sell where:

- the ***sole*** purpose of the performance is to promote the sale of copies or phonorecords of the work;
- the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring; and
- there is no direct or indirect charge made to hear the performance.

The expanded exemption for online "retailers" envisioned by DiMA would meet none of these statutory criteria, and would do violence to the balance of interests struck by Congress in section 110(7).

First, a transmission made by an online retailer to an online purchaser is, by definition, sent "beyond the place where the establishment is located." Under the current exemption, some traditional, brick-and-mortar retailers play music over loudspeakers in the music sales area for the benefit of patrons who have traveled to the store. Others offer headsets and allow a potential buyer to listen to all or portions of selected discs, often subject to special promotional efforts. In each instance, the music available to potential customers is selected by the retail establishment for the limited use of such customers within a discrete sales area. Music cannot be enjoyed outside the retail establishment unless it is purchased. Thus, the physical limitation of the current exemption in section 110(7) ensures that the public performances subject to the exemption are those that promote the shared interests of the retailer and the copyright owner. Those uses are -- in the language of the statute -- those that have the "sole purpose" of promoting the sale of copies or phonorecords of music.[12]

NMPA and its members believe it is highly unlikely that public performances of music offered by an online retailer would ever be for the "sole purpose" of promoting the sale of copies or phonorecords of their works. It remains true that a majority of commercial online businesses earn a substantial portion of their revenues from advertising. Companies are willing to pay a web-based business to promote their products or services based on the number of visitors to the site or the number of "hits" to a particular page containing the advertising. Given the enormous popularity of music sites on the Internet, "retailers" could be expected to use music to attract visitors to the site for the purpose of generating advertising revenues alone. Any such financial motivation would eliminate the sale of phonorecords as the "sole purpose" of the performance, and run afoul of the promotional purpose underlying the exemption.

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[12] DiMA, for its own purposes, chooses to read the "sole purpose" test out of the law. The DiMA Comments, at page 21, states "Section 110(7) exempts retail record stores from paying music license fees when they perform music in their stores 'to promote the retail sale of copies or phonorecords of the work.'" Read in full, the relevant criteria of section 110(7) provides an exemption where "the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work."

DiMA proposes that online "retailers" be permitted – without payment of any kind to the copyright owner -- to transmit public performances of music and sound recordings to any potential "customer" at that customer's home or workplace – or, in the near future – to a hand-held device that could accompany the customer anywhere. And the "retailer" could offer such public performances (free to the retailer), uninterrupted, 24-hours a day. Presumably, the "retailer" could offer narrow-cast "promotional" channels aimed at established and commercially successful genres, as well as emerging ones. Another channel could allow "customers" to listen to the "artist of the week."

NMPA questions how – or even whether -- the listening public would distinguish public performances offered by "retailer"/webcasters from those offered by licensed webcasters that were not also retailers. More to the point, we question whether, if DiMA were to get its way, there would be any non-"retailer" webcasters. Why would a webcaster pay for the music it uses if it were able to avoid the payment obligation simply by placing "buy" buttons on the pages of its web site?

As DiMA itself points out, its membership is growing rapidly – from 7 to more than 50 companies in less than two years. Among its members are some of the best known and most successful "dot com" ventures: Amazon.com, America Online, EMusic.com, Tower Records, Yahoo!, and others. Most of these companies are thriving now, under the law as it is written. Music publishers have licensed some DiMA members, and look forward to working with others to conclude mutually acceptable agreements.

The payment of fair license fees to music copyright owners and creators will not threaten the growth of webcasting or other services offering music online. But a rush to shoe-horn every new e-business model for offering music into some – or many – existing but inapposite limitations on rights or exemptions from liability will ensure that the Internet never becomes a vibrant business for music copyright owners and creators. DiMA's attempt to draw section 110(7) into the scope of this study is one such effort; it should be rejected.

Conclusion

NMPA and its members appreciate the opportunity to comment on the important matters within the scope of this study. We looking forward to reviewing reply comments received, and to participating in any further proceedings that may be scheduled.

Respectfully submitted,

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Digital Media Association

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARMENT OF COMMERCE
Washington, D.C.

Report to Congress Pursuant to)
Section 104) Docket No. 000522150-0150-01
Digital Millennium Copyright Act)

REPLY COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

In its initial August 4 Comments to the Copyright Office and the National Telecommunications and Information Administration in the above-captioned proceeding, the Digital Media Association ("DiMA"), http://www.digmedia.org, made three key points as to how Sections 109 and 117 of the Copyright Act should be implemented so as to promote legitimate electronic commerce:

- The "first sale" doctrine must unambiguously allow consumers to freely transfer and resell copies of copyrighted works that they purchase online via digital downloading.
- No copyright owner should be able to claim infringement or additional royalties against the few seconds of "buffer" memory used in the normal course of webcasting.
- Consumers should have the right to make an archival copy of media that they acquire by digital downloading so as to protect their e-commerce purchases against catastrophic losses, and to allow them to move their content to upgraded computers and servers.

Although DiMA believes that the law already supports these principles,[1] DiMA also noted in its Comments that differences of opinion existed on these critical issues as between new digital media companies and certain entrenched copyright interests. DiMA therefore advocated clarifying the first sale doctrine and temporary and archival copying exemptions through the Section 104 Report and, as appropriate, through legislative amendments.

The submissions of several commenting parties, largely representing traditional copyright interests that manufacture physical media, confirm precisely why clarity is so sorely needed, now, for the digital age. In their view, existing policies that have worked well for hard goods should not be permitted (no less adapted or expanded) for any new e-commerce models. The first sale doctrine, they contend, should apply only to physical media – not to content sold via digital transmission. The privileges of archival and temporary copying, they assert, likewise should not extend to digital media – indeed, some contend that even for software these rights should be either repealed or restricted.

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[1] DiMA Comments at 6, 16. Accord, Comments of National Association of Recording Merchandisers and Video Software Dealers Association (hereinafter "NARM-VSDA Comments") regarding the first sale doctrine.

The majority of copyright owner comments can be boiled down to two arguments. First, they contend that historical limitations on copyright owner rights should not extend to digital media because of the threat of Internet piracy. In effect, they argue that lawful consumers should be denied their right to exercise well-established economic privileges, simply because some people steal. DiMA members, which provide ecommerce services to law-abiding consumers, are not willing to make that trade-off. Congress enacts laws, such as first sale and temporary copying privileges, to protect the rights of consumers and copyright users, and separate laws to protect copyright owners from piracy. Failure to extend established privileges into the digital environment unfairly treats law-abiding citizens as thieves and customers as enemies. Unless the law grants the public at least the same rights and privileges in their digital purchases as their physical purchases, the law will deter rather than facilitate e-commerce.

Second, they argue, it is "premature" to change copyright limitations and exemptions, and that the law should wait for the markets to develop. What a change in attitude from just two years ago, before the DMCA was enacted. Then, the clarion call from content owners was that "digital is different" and "the market will not develop without new rules of the road." Now that they have their new digital rights, apparently some content owners find that the old, analog-only rules are good enough for everybody else.

As DiMA explained in its Comments, commercial digital delivery of copyrighted works will succeed by providing consumers with at least the same value that they have come to expect from physical commerce. Consumers want and deserve the right to utilize, for their own legitimate purposes, the flexibility inherent in digital technology. To accommodate consumer rights, copyright law must evolve in response to technological change, as it always has done, by balancing private incentives against the paramount public interests.[2] Any failure of copyright law to meet the challenges of new technology will not forestall change; but the old law and its adherents will surely be left behind. Indeed, if there is any lesson to be drawn from the last two years' experience, it is that inertia poses as great a threat to robust, legitimate ecommerce as piracy.

As an association of companies focused on building these new digital media markets, DiMA demonstrated in its initial Comments that the time for clarification of copyright law is now. Delay benefits only scofflaws and Luddites who, each for their own reasons, oppose legitimate e-commerce. As further explained below in these Reply Comments, other commenters have demonstrated no sound reasons why the first sale doctrine and section 117 should not now be adapted and modernized for the electronic commerce environment.

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[2] DiMA Comments at 2-5.

I. THE COMMENTS DEMONSTRATE THE NEED TO CLARIFY THAT THE FIRST SALE DOCTRINE EXTENDS INTO THE DIGITAL ENVIRONMENT.

As the comments received demonstrate, interested parties disagree as to whether the first sale doctrine applies to digital works. On one end of the spectrum are the comments of organizations such as the National Association of Recording Merchandisers ("NARM") and Video Software Dealers Association ("VSDA"), who "take strong exception to the premise upon which the questions in the Request for Comment appear to be based," because they believe that "the first sale doctrine already applies to digital media." Joint Comments of NARM and VSDA at 2-3 (emphasis in original). On the other end of the spectrum are the comments from groups such as the Software & Information Industry Association ("SIIA"), which urge the Copyright Office and NTIA to "reaffirm the status quo" and make clear that "the first sale exception does not apply to digital distribution mechanisms." SIIA Comments at 3. See also Comments of Time Warner at 1 ("It is clear that Section 109 does not apply to works distributed by transmission."). As suggested by the Comments filed by DiMA, the American Library Association et al. (the "Library Associations"), the Digital Future Coalition ("DFC"), and the Home Recording Rights Coalition ("HRRC"), among others, these disparities highlight the need for legislative clarification of Section 109 so as to ensure its proper application to digital works.

A. Certain Comments Ignore or Misstate the Public Policies Underlying the First Sale Doctrine.

Some comments received pursuant to the June 5 Federal Register Notice mischaracterize or misperceive the historical and policy reasons underlying the first sale doctrine. As DiMA noted in its Comments, the first sale doctrine is a specific application of the general economic and public policy against restraints on the alienation of property or trade in lawfully-acquired copyrighted works. In copyright law as in patent law, Congress and the courts determined that the economic incentive to create copyrighted works is satisfied by the first sale of the copy; hence, any restraint on alienation was unnecessary to provide that incentive.[3]

SIIA ignores that the policy against restraints on alienation of property underlies the first sale doctrine. Instead, SIIA asserts that the first sale doctrine is unnecessary because ecommerce will enable anyone to buy a copy of works online. In effect, SIIA suggests that the focus of the first sale doctrine is to facilitate copyright owners' ability to sell copyrighted works -- as if the first sale doctrine exists as a means to satisfy consumer demand.[4] However, as DiMA noted in its Comments, copyright policy exists primarily to serve the public good, not only to establish economic rights for copyright owners.[5] Under the existing first sale doctrine, when consumers purchase a copyrighted book or phonorecord from a traditional "brick and mortar" establishment, those consumers' investment includes the right to dispose of that copy as they wish. In order to promote e-commerce, consumers that purchase copyrighted works via digital delivery should be ensured that they receive the same value for their investment as when they buy a book, compact disc, or video game from a traditional retail outlet, which necessarily includes the right to resell, lend or give away that particular item.

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[3] DiMA Comments at 5-6. See also Joint Comments of NARM and VSDA at 9, noting that "one of the ordinary incidents of ownership in personal property is the right of alienation of that property, which is attached to the ownership," quoting Harrison v. Maynard, 61 F. 689, 691 (2d Cir. 1894).

[4] SIIA suggests, for example, that "new licensing and delivery systems will enable just about any computer user to obtain a copy of virtually any work easily and quickly. .... Accordingly, there is no need for the first sale exception to apply to the Internet and related digital distribution systems." SIAA Comments at 3. Similarly, they contend, since "e-commerce provides opportunities for unprecedented choice, convenience and access to creative

To the extent that the first sale doctrine does foster dissemination of copyrighted works, this argument also favors the exercise of that privilege via digital transmissions. For example, as discussed in the Comments of the Library Associations, the absence of a digital first sale doctrine will impede the free flow of information, including the ability of libraries and others to provide access to digital works to those elements of the public that lack the resources and opportunities that SIIA touts as diminishing the need for a first-sale doctrine. See Library Associations Comments at 2. Applying the first sale doctrine to digital works will enable consumers to donate digitally-acquired works to libraries or sell them at reduced prices to less affluent members of the public, and thereby narrow the divide between the digital "haves" and "have nots."

Finally, even though our member companies are dedicated to building legitimate ecommerce in copyrighted works, DiMA members nevertheless recognize and believe that Internet commerce cannot be the exclusive province of corporate vendors. The Internet already has become a consumer market for auctioning, selling and otherwise recycling used goods, and we fully expect this trend to continue. Several Internet entrepreneurs have built successful businesses around consumer trading, and one can readily foresee how technology and the Internet can construct a secure resale market using digital transmissions. This enhanced ability to meaningfully exercise the first sale privilege should not be denied to consumers. Thus, sound economic and public policies demand that consumers should be able to transfer possession of their digitally-acquired content using digital technologies.

B. Several Comments Demonstrate a Misunderstanding of How A Digital First Sale Doctrine Would Operate.

As explained in DiMA's Comments, as well as the joint comments of NARM and VSDA, a digital copy authorized by the copyright owner that is downloaded by a consumer is conceptually no different than a copy made by the copyright owner and then sold to the consumer. In both instances, it is a copy that was "lawfully made" with the copyright holder's permission.[6] Time Warner apparently agrees with this assertion,[7] and other commenters give no

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content…the development of e-commerce has resulted in a reduced need for the first sale doctrine." SIIA Comments at 5.

[5] DiMA Comments at 2-5. See also Comments of the Library Associations at 3 ("the public benefit derived from the alienability of creative works outweighs the increased incentive to create that would step from granting authors perpetual control over copies of a work.").

[6] See DiMA Comments at 6-13; Comments of NARM and VSDA at 13.

rationale as to why consumers should not have full possessory rights in a digital file that was created on their computer with the permission of the copyright holder.

Yet, some commenters erroneously assume that extending the first sale doctrine to digitally-delivered works necessarily would distort the doctrine into a license for unlimited unauthorized copying.[8] Indeed, a recurring theme among those opposed to clarification and/or extension of Section 109 is that a digital first sale doctrine would lead to widespread piracy and circumvention of copyright owners' rights.[9] To be charitable, any argument that the first sale privilege will promote piracy is a fallacy.

Extending to consumers the right to resell the digitally-delivered works that they have lawfully acquired will neither encourage nor lead to unlimited reproduction and distribution of copyrighted works. The policy reasons underlying the first sale doctrine, coupled with the policies advocating the promotion of e-commerce, dictate that the first sale doctrine can and should be extended beyond the mere chattel found in a tangible medium, and should apply to digital copies as well. Technological developments clearly exist which make the coexistence of these goals possible. As discussed thoroughly in DiMA's Comments, and explained in its June 8, 1998 testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade and Consumer Protection, technology can ensure that the particular digital copy is deleted (or made permanently inaccessible) from the transferor's computer upon digitally transferring the data to the transferee. This, along with digital rights management systems, will foster new innovations that will actually decrease the piracy risks that concern these commenters.[10]

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[7] Comments of Time Warner at 2 n.1.

[8] See Comments of Time Warner at 2. Time Warner exemplifies its arguments against the "digital first sale doctrine" by stating "when the owner of a lawful copy of a CD 'rips' a song into a digital MP3 file and then transmits that file to one or more friends, the first sale doctrine cannot be invoked to provide legal justification for the reproduction involved and the multiple resulting copies." Id.

[9] For example, the Comments of Copyright Industry Organizations state that "since the copy in question is a perfect copy, as well as a potential master for the production of an unlimited number of additional perfect copies, all of which can conveniently be redistributed over digital networks to a virtually limitless class of recipients, the consequences of an unjustified expansion of the first sale doctrine could easily overwhelm the incentives for production of creative works." Id. at 4.

[10] Time Warner further confuses the issue by attempting to equate the delivery of digital material to "immaterial" distributions by television broadcasts or cable and satellite transmissions. This argument completely overlooks the differences between ecommerce and digital delivery, and broadcast or cable or satellite transmissions. These transmissions, like the streaming of content for virtually simultaneous viewing, are not the same as the purchase of a digital file containing a copyrighted work -- which is the subject of DiMA's Comments.

Ultimately, the comments opposed to a digital first sale privilege arguments misstate the policy that DiMA and others are advocating. DiMA and others do not seek the extension of the first sale doctrine in order to promote piracy and copyright infringement; indeed, piracy equally harms DiMA members who wish to establish the legitimate Internet market for copyrighted works. We advocate extension and/or clarification of the first sale doctrine to promote e-commerce through lawful means and to minimize the opportunities and impact of piracy. As pointed out by the Comments of DiMA, technology exists to secure the first sale privileges in a digital environment, including digital rights management systems, encryption, authentication, and password-protection.[11] These technologies will make it much easier for the rights of copyright owners to be protected while at the same time ensuring consumers of their possessory rights. Explicitly extending the first sale doctrine will encourage the development of even more efficient digital rights management systems that will even further minimize the impact of piracy. Thus, the result of the clarifications advocated by DiMA are far-removed from the dire scenarios hypothesized by the Copyright Industry Organizations.

C. The Absence of a Digital First Sale Doctrine May Encourage Abuse of Copyrighted Works.

Although new licensing and delivery mechanisms may enable more consumers to access the works via electronic means, as pointed out in several of the submitted comments, the absence of a first sale doctrine may increase the likelihood of abuse of copyrighted works. First, the experience of the last two years shows that, with respect to digital downloading, if you build it, consumers will come; but if copyright owners won't build it, someone else will. If digital delivery satisfies consumer needs, including a means to transfer ownership, then ecommerce will succeed. But if there is no first sale right for digitally-delivered media, consumers will find some other way to exercise these privileges. Without a first sale right, DiMA fears that circumvention technologies like DeCSS, DivX and others, will gain popularity among otherwise law-abiding consumers who understandably cannot abide overly-restrictive and hypertechnical copyright laws.

Already such restrictive terms are finding their way into licenses for digitally-delivered content. Just imagine what the last 20 years of CD sales would have been like if every purchased CD came with enforceable contractual conditions such as these:

1. You may play this compact disc only on one compact disc player.
2. You may not copy any song from this compact disc onto a cassette, personal computer hard drive or any other device, regardless of whether that copy is being made for personal or fair use.
3. You may not resell, lend or otherwise transfer ownership of this compact disc to any other person under any circumstances, including bankruptcy and divorce.
4. Your compact disc collection will self-destruct upon your death.

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[11] See DiMA Comments at 7-10. See also HRRC Comments at 5.

No rational person could argue that the compact disc market would be as robust today as it has been over the last two decades -- assuming that it even would exist at all -- if such unreasonably restrictive conditions were imposed against typical consumer usage of recorded music. Yet, these are the types of actual, binding restrictions that accompany today's ecommerce transactions in digitally-delivered media.[12] Unless copyright law adapts essential consumer privileges such as first sale to the new ecommerce environment, such restrictions may be merely the harbinger of more invasive conditions to come.

As outlined by the Joint Comments of NARM and VSDA at 18, there is a growing concern that copyright owners are attempting to use their copyright monopoly in conjunction with technological measures to circumvent the first sale doctrine and to restrain competition, through the purported licensing of "rights" not recognized by copyright. Other commenters, such as the Library Associations and the DFC, suggest that the Report should address this problem by recommending both the adoption of the digital first sale doctrine and an amendment to Section 301 of the Copyright Act confirming the supremacy over state laws of these federal law exemptions and privileges.

DiMA agrees that there is a compelling public interest in preventing the over-exertion of control on the part of copyright holders once they have received a fair return on their creativity and have exhausted their rights. This interest is served by clearly and consistently applying the first sale doctrine to digitally delivered works.

II. SECTION 117 SHOULD BE CLARIFIED TO EXPRESSLY PERMIT CERTAIN TEMPORARY AND ARCHIVAL COPYING OF OTHER DIGITAL WORKS.

As DiMA explained in its Comments, the Section 117 exemption should be clarified to explicitly extend to at least three types of typical copying of digital media:

- First, consumers should be able to make a back-up or archival copy or phonorecord of content that they acquire through digital downloading. Archival copying can protect consumers against loss of files due to accidental deletion, hard disk damage or corruption, or virus infection. Likewise, consumers upgrade their systems every few years, and need some means of transferring their media collections to their new computer. DiMA believes that this principle should be explicit in the law, although varied technological means (such as restoring content from offsite agents) may be used to securely implement this right.

- Second, temporary copies of recorded content made in the course of playback also should be exempt from claims of infringement. This is no different than the case directly contemplated by Section 117(a), in which copyrighted software is loaded into random access memory ("RAM") for processing and performance or display.

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[12] See, e.g., Comments of Computer Professionals for Social Responsibility at 6; http://www.bluematter.com/privacy/license.html.

- Third, the few seconds of buffered content recorded in RAM, as required for playback of Internet webcasting, should be deemed not to be copyright infringement.

See DiMA Comments at 14-20. DiMA's Comments further explained why these views should not be controversial, yet certain copyright owners expressed contrary views in their submitted comments. DiMA demonstrates below why these opposing views do not justify further limitations on consumer rights, and suggests that an explicit amendment to Section 117 could benefit all parties by clarifying the legal status of these noninfringing copies.

A. Public Misperceptions about 117 and Threats of Piracy Should Not Preclude the Extension of Section 117 for Legitimate Purposes.

Another recurring theme in several comments is that there is widespread public misperception and misapplication of Section 117 of the Copyright Act, and as such, it should not be extended to cover digitally transmitted media.[13] While DiMA agrees with the need for greater clarity and education concerning copyright law, ignorance of current law should not be used as an excuse to impede the development of ecommerce or the rights of law-abiding consumers.[14] Miseducation about the law cannot justify limiting the ownership rights of legitimate consumers – particularly when case law has upheld laws such as 17 U.S.C. § 1201 against the types of fallacious arguments of concern to these commenters.[15] Extending Section 117 to other digital works can and should coexist with "a systematic and sweeping process of educating the public on the 'dos and don'ts' of section 117" as advocated by SIIA. See Comments of SIIA at 4.

B. The Policy and Technological Justifications for Section 117 Still Exist Today.

Several of the comments suggest that technological changes have made the archival copy exemption in Section 117 largely unnecessary for the purposes for which it was originally enacted, and accordingly the archival exception is not needed in the current technological environment. See Comments of IDSA at 4; Comments of SIIA at 8. This argument conspicuously overlooks that circumstances do still exist which necessitate the creation of an archival copy to protect one's investment in a copyrighted work, especially when that work is obtained via digital delivery.

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[13] See, e.g., Comments of the Interactive Digital Software Association ("IDSA") at 5 (discussing web sites that allegedly engage in piracy who "refer to Section 117(a)(2) only to provide a patina of legitimacy to their operations, and to foster a false sense among users that a patently illicit transaction…might in fact somehow be lawful. They exploit the statute, in other words, not as a legitimate defense to infringement, but as an enticement to engage in piracy."); Comments of SIIA at 4 ("The days of people using section 117 as an excuse for software and content piracy must come to an end.").

[14] In this regard, DiMA concurs with the HRRC that, "[temporary] copies made in the course of viewing or lawfully gaining access to a work have nothing to do with piracy. The law should make clear this distinction." Comments of HRRC at 8.

[15] See DiMA Comments at 18-19.

Other comments observe that CD-ROMs serve as archival copies, and that the potential for inadvertently damaging a CD-ROM is extremely rare. For example, IDSA argues that "while the type of 'mechanical or electrical failure'...or it's 21st century equivalent, the system crash still occurs, the user does not need to make an archival copy [because] the originally acquired copy serves that purpose." Although admittedly true, such an emphasis does not apply to digital rights in downloaded media. Digital delivery and other new methods of distributing software still necessitate, and actually may increase the need for, an archival backup.[16]

Similarly, several comments detract from the focus on Section 117 by arguing that "business models" and other strategies eliminate the need for Section 117. For example, SIIA argues that selling software over networks and making software available through Application Service Providers makes Section 117 obsolete since the user can access the software "any time and anywhere." Comments of SIIA at 8. Whether such licensing and business applications gain market acceptance remains to be seen, but the argument is irrelevant to digital downloaded content. Section 117 addresses the case where a copy must permanently reside with the user in order for the user to use the product. That may not be necessary for networked or thin client computing, but most definitely is required for the digitally-downloaded content addressed in DiMA's Comments.

Consumers have a right to secure their investment in their collections of copyrighted works. Digitally-acquired content can be lost through error or damage; or may be rendered useless if consumers are unable to transfer their content to another computer when they upgrade their system. The rationales underlying the archival exception of Section 117 apply with equal force to content lawfully acquired through digital download, whether it is music, text, graphics or motion pictures.

C. Temporary Copies of Recorded Content Made for Playback Should Be Exempt from Claims of Infringement, as Should the Technical Process of "Buffering" that Occurs During Internet Webcasting.

DiMA and others advocate that Section 117(a)(1) should be extended and clarified to apply to other digital devices and media forms beyond merely software.[17] Although the World Wide Web and digital distribution may not have been foreseeable when Section 117 was originally promulgated, the technical functionality of the Internet makes it logical and reasonable to extend the principles underlying Section 117 to the "statements and instructions" in new digital media. The transmission of all digital data, whether software or copyrighted works sold or webcast via the Internet, necessarily involves the moving of packets of information from the RAM of one server to the RAM of the next, making at each stage certain "reproductions" necessary for the system to function. See Comments of CCIA at 3. Thus, as CCIA noted, "temporary copying is inherent to digital technology". Id. at 3.

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[16] DiMA Comments at 15, 19. Accord, Comments of the HRRC at 6, "consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading."

[17] See Comments of DFC at 3-4; Comments of HRRC at 6-8; Comments of CCIA at 2.

Particularly in the case of Internet webcasting, streaming audio or video requires the temporary storage of data before it is reassembled and played for the consumer. As DiMA explained in its Comments at 16-20, the temporary buffer storage of a few seconds of content during webcasting is merely a technological means of facilitating smooth performance of real-time transmissions. The data are not recorded or accessed for other purposes, and have no economic value apart from the performances themselves. If the performances themselves are lawful, it would be a travesty of copyright and economic policy to deem them unlawful simply because of this short buffer. The Copyright Office recognized this principle in the course of the Distance Education study, and we urge that the Copyright Office and NTIA reaffirm and apply that principle more generally to webcasting.

In sum, for both downloading and webcasting to become viable modes of e-commerce, the law should be clarified to assure web businesses and consumers that these actions will not expose them to potential copyright liability. To that end, DiMA echoes the sentiments of HRRC, CCIA, and DFC, in requesting that the Copyright Office and NTIA support clarification and extension of Section 117.

III. CONCLUSION

As is evident from DiMA's Comments and Reply Comments, there is a pressing need for both Section 109 and Section 117 to apply to new digital ecommerce in copyrighted works. These existing limitations and exceptions to the rights of copyright owners have served the public well, and have not in the least harmed the interests of copyright owners. Indeed, by acknowledging privileges and granting reasonable latitude in consumers' personal uses of copyrighted works, copyright law has enhanced the value of purchasing copyrighted works over watching and listening to performed programming.

Ecommerce promises to revolutionize the market for copyrighted works, and to give consumers even greater flexibility and control over their own acquired content. Yet, the promises of ecommerce are not guarantees. Indeed, some have argued, not entirely without justification, that copyright owners' first shots fired in the ecommerce revolution have caught them squarely in the foot. Ecommerce will gain acceptance only if and when consumers obtain from lawfully-acquired digital downloads the same full value that they receive from physical media – including first sale rights and archival and temporary copying. This only can occur in a legal environment that supports and facilitates ecommerce, and that adapts reasonably and timely to new technological and economic models.

Unfortunately, certain comments resist even these modest copyright law changes needed to accommodate ecommerce. The uncertainty created by these conflicts deters investment and commitment to new business models, benefiting no one. DiMA therefore respectfully renews its request that the Report of the Section 104 Study recommend the prompt clarification and, as necessary, the adaptation and expansion of the first sale doctrine and Section 117 exemptions, to promote the digital distribution of copyrighted media and electronic commerce.

Respectfully submitted,

Jonathan Potter Executive Director Digital Media Association 2111 Wilson Boulevard, Suite 1200 Arlington, VA 22201 (703) 276-1706 jpotter@digmedia.org	Seth D. Greenstein Counsel, Digital Media Association McDermott, Will & Emery 600 13th Street, N.W. Washington, D.C. 20005-3096 (202) 756-8088 sgreenstein@mwe.com

Date: September 5, 2000

Appendix 8

Summaries of Testimony for November 29, 2000 Public Hearing Filed in Response to 65 FR 63626

No.	Individual Testifying	Organization(s) Represented
1	Keith Kupferschmidt	Software & Information Industry Association
2	Dr. Lee A. Hollaar	Self
3	Steven J. Metalitz	American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America
4	Carol A. Kunze	Red Hat, Inc.
5	Scott Moskowitz	Blue Spike, Inc.
6	David Goldberg	Launch Media, Inc.
7	David Pakman	myplay, inc.
8	Marvin L. Berenson	Broadcast Music, Inc.
9	Bernard R. Sorkin	Time Warner Inc.
10	Emery Simon	Business Software Alliance
11	Alex Alben	RealNetworks, Inc.
12	Susan Mann	National Music Publishers' Association, Inc.
13	Gary Klein	Home Recording Rights Coalition
14	Seth Greenstein	Digital Media Association
15	James G. Neal and Rodney Peterson	American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association
16	Cary Sherman	Recording Industry Association of America, Inc.
17	Charles Jennings	Supertracks, Inc.
18	Fritz E. Attaway	Motion Picture Association of America
19	Professor Peter Jaszi	Digital Future Coalition

20	Daniel C. Duncan	Digital Commerce Coalition
21	Pamela Horovitz	National Association of Recording Merchandisers
22	Crossan Andersen	Video Software Dealers Association
23	Nic Garnett	Intertrust Technologies Corporation
24	David Beal	Sputnik7.com
25	Allan R. Adler	Association of American Publishers
26	Robert F. Ohlweiler	MusicMatch Inc.

Software & Information Industry Association

ONE PAGE SUMMARY OF THE TESTIMONY OF KEITH KUPFERSCHMID ON BEHALF OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION ON THE REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DMCA BEFORE THE U.S. COPYRIGHT OFFICE AND NTIA

November 29, 2000

SIIA is the principal trade association of the software and information industry and represents over 1,000 high-tech companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. SIIA and our members are extremely interested in issues relating to the interplay between new technologies, e-commerce and the copyright law.

With regard to the first sale doctrine, section 109 of the Copyright Act, SIIA strongly believes that no change to the language of section 109 is appropriate. Not only is such a change unwarranted, but even if one were to proffer some good reason for changing the scope of section 109, we assert that it is much too early in the development of e-commerce and business models are evolving much too rapidly to make any changes in section 109 at this time. In particular, the so-called simultaneous destruction proposal suggested by some of the commentators ignores too many evidentiary and practical considerations to warrant any serious consideration.

SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 Report that: (1) the first sale exception does not apply to digital distribution mechanisms such as the Internet; and (2) given the Congressional intent underlying the first sale exception and the ease by which consumers have and will have access to a wider variety of copyrighted works that ever before, it would be inappropriate to expand the first sale exception into the digital distribution environment.

With regard to section 117, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of section 117. All to often, we have become aware of persons engaged in software and content piracy who are attempting to use section 117 as a way of legitimizing their piratical activities. The days of people using section 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public on the "dos and don'ts" of section 117 (as well as other provisions of copyright law) conducted by the Copyright Office and the Administration.

Section 117 was enacted at a time when the need to make a back up copy of your software was essential. Technology and business models have evolved to a point where the need for the provisions in section 117 relating to the making of a back-up copy of your software no longer exist. Moreover, it seems senseless to expand section 117 to other copyrighted works when it is being used so sparingly today for computer software and the justification for the provision no longer exists.

Dr. Lee A. Hollaar

Summary of Intended Testimony
November 29, 2000, Public Hearing
Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

Dr. Lee A. Hollaar
Professor of Computer Science, School of Computing
University of Utah

Currently the archive right in 17 USC 117 provides:

> [I]t is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided ... that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Section 117 assumes that only computer programs need to be backed up to guard against a failure of the disk drive normally holding the computer program or a similar catastrophic failure that will require the restoration of the computer program, and that archival backups are done on a program-by-program basis. In many common backup situations, neither is the case.

Many of today's software packages include not only computer programs (defined in 17 USC 101 as "set[s] of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result") but also data files. One needs only to go to the directory where any software package has been installed to see examples of such non-program files: help files and other documentation for the software package, configuration files that are read by the computer programs to select various options, and clip art files that generally come with word processors. In many instances, the programs cannot function correctly if certain key data files are not present. Clearly, for a backup to serve its intended purpose of being able to restore a system to its state before a disk failure, such non-program files also must be archived.

Backup operations on file servers copy an entire file system or selected directories to the archive medium. Between full backups, incremental backups are made comprising those files that have been changed since the last backup was made. Such backup operations generally do not discriminate between computer programs and other types of files. They make a copy of every file on the particular file system or directory. These backup are generally performed by a system administrator, who can't reasonably be aware of whether a file is a computer program or a data file, whether the limits on backup copies in software licenses have been exceeded, or even whether the user has rightful use of the programs and files. With the advent of CD-ROM drives on personal computers, many users are writing similar backup disks of their personal directories. Although such file backups are done (or should be done) at every computer installation, there is nothing in Section 117 that sanctions them. These backups should be addressed by Section 117, so that people will respect its other limits.

Section 117 is also unrealistic in its requirement of destroying all archive copies when a license to a software package has expired. It would be exceeding difficult to delete such program files from a tape backup, even if it were clear which files to delete. It is impossible to selectively delete files from a CD-ROM, which can't be changed after it has been written. But that inability to delete such files will not result in any hardship for copyright owners, since system administrators or users are unlikely to give their backups to others because of the personal information and other files that they also contain.

Amending Section 117 to permit the creation of archive files containing not only computer programs but any digital information, and removing the requirement that files on the archive must be destroyed, will not provide a loophole for copyright infringement of digital material. It would still be an infringement of copyright to use the backed-up information without authorization, since the archive right only covers the creation of the backup, not any reading of information from the backup. But it will recognize the realities in file backup procedures.

American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America

Summary of Intended Testimony of

Steven J. Metalitz

on behalf of

AMERICAN FILM MARKETING ASSOCIATION
ASSOCIATION OF AMERICAN PUBLISHERS
BUSINESS SOFTWARE ALLIANCE
INTERACTIVE DIGITAL SOFTWARE ASSOCIATION
MOTION PICTURE ASSOCIATION OF AMERICA
NATIONAL MUSIC PUBLISHERS' ASSOCATION
RECORDING INDUSTRY ASSOCIATION OF AMERICA

November 29, 2000

The copyright industry associations listed above do not believe that an amendment to section 109 of the Copyright Act to cover digital transmissions is either necessary or advisable. The first sale doctrine continues to apply with full force in the digital environment, when someone who owns a lawfully made copy or phonorecord wishes to sell or otherwise dispose of the possession of that copy or phonorecord. Proposals modeled on Section 4 of H.R. 3048, 105th Cong., go far beyond simply "updating" or even "extending" the first sale doctrine, which limits only the exclusive right of distribution. These proposals would hyperinflate first sale and impose completely new limitations on other exclusive rights long enjoyed by copyright owners, notably the reproduction right. Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy.

New distribution models offer the potential to increase consumer choice and promote the business viability of dissemination of works of authorship in digital formats. Limitations on the reproduction right like those proposed as amendments to section 109 would make it impossible to implement many of these models. Nor do current or reasonably anticipated future market conditions justify the encroachments on contractual freedom, or on the ability of copyright owners to employ access control technologies, that some commenters advocate (and somehow link to section 109). Finally, all the library activities identified in the questions posed in the October 24 notice may be carried out in the digital environment without the need for any amendments to section 109.

While the Digital Millennium Copyright Act made no changes to section 109, it did amend section 117, with the effect of reaffirming the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right. This recognition takes on added importance in light of the increasing economic significance of such "temporary copies" in the legitimate dissemination of computer programs and other kinds of copyrighted works. Proposals to amend section 117 to overturn this well-settled principle of U.S copyright law should continue to be rejected. There is no evidence that the fundamental exclusive right of copyright owners needs to be weakened in order to promote electronic commerce; indeed, the effect is likely to be to the contrary. Enacting the proposed "incidental copies" exception would undercut the reproduction right in all works, and would raise significant questions about U.S. compliance with its international obligations. The listed copyright organizations do not believe that the recent amendment to section 117 has caused any problems that would justify any expansion of that section.

Red Hat, Inc.

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November 19, 2000

Jesse M. Feder
Policy Planning Advisor
Office of Policy and International Affairs
U.S. Copyright Office
Copyright GC/I&R
Washington, D.C. 20024

Jeffrey E.M. Joyner
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Office of Chief Counsel
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Sent by electronic mail to:
104study@loc.gov; 104study@ntia.doc.gov

Re: Request to Testify at November 29, 2000 Hearing

Dear Messrs. Feder and Joyner:

This is a request for Carol A. Kunze, independent counsel, to testify on behalf of Red Hat, Inc., a public corporation with headquarters in Durham, North Carolina, at the November 29, 2000 hearing on, among other issues, Section 109 of the Copyright Act.

Summary of Testimony: The testimony will identify policy considerations relating to the application of Section 109 to digital products. It will focus on the importance of not jeopardizing the ability of open source and free software licensors to ensure that third party transferees receive the *entire* product whose distribution was authorized by the licensor, including the license rights granted with the software.

Red Hat distributes the Linux operating system, which is a type of software known as *open source* or *free software*. Both open source and free software licenses grant users the right to;

1) have the source code,
2) freely copy the software,
3) modify and make derivative works of the software, and
4) transfer or distribute the software in its original form or as a derivative work, *without paying copyright license fees*.

Many open source and free software licenses also embody the concept known as *copyleft*. Simply put, this is the requirement that all versions of the product, including derivative works, be distributed along with and subject to the restrictions and rights in the license under which the original work was received. This concept is central to the ability of a licensor to ensure that its product *remains* open source/free software.

Any amendment to Section 109 that purported to create a right to transfer copies of open source and free software *without* the accompanying license rights, would seriously jeopardize licensors' and users' joint interest in maintaining a product's status as open source/free software, and would deprive transferees of important copyright authorizations which the original copyright owner intended them to have.

This issue is of fundamental importance to the continued development and distribution of many open source and free software products. We believe it constitutes a policy consideration that should inform any recommendation to amend Section 109 with respect to its application to digital products.

Sincerely,

Carol A. Kunze

cc: jfed@loc.gov
mpoor@loc.gov
jjoyner@ntia.doc.gov

Blue Spike, Inc.

DRAFT

SCOTT MOSKOWITZ
CHIEF EXECUTIVE OFFICER
BLUE SPIKE , INC.

A. Introduction

1. The company is the leading developer of secure watermarking technology for use in copyright management systems and other applications that can create trust as a means of balancing the interests of copyright owners and information consumers.

2. The growth of the Internet and electronic commerce will not reach their full potential if technologies and laws are developed on the assumption that access restriction is the only credible approach to securing copyrighted works and protecting intellectual property.

B. Section 109 of the Copyright Act should be amended to include digital transmissions, as proposed by Congressmen Rick Boucher and Tom Campbell in section 4 of H.R. 3054.

1. With content migrating from paper to bits, the law--in particular the first sale doctrine--must keep pace with technology for electronic commerce to flourish.

2. Technology can be used to advance the core principle underlying the first sale doctrine.

3. If the law keeps pace with technology, content owners and information consumers will benefit to the greatest extent as new communications media and Internet technologies generate recognition and demand for artists' work.

C. Section 117 of the Copyright Act should be amended to provide that it is not an infringement to make a copy of a work in a digital format if such copying is incidental to the operation of a device in the course of an otherwise lawful use of a work and if it does not conflict with the normal exploitation of the work, as proposed in section 6 of H.R. 3054.

1. The law should recognize that the Internet cannot function without ephemeral copying.

2. It is important to reduce the risk of potential legal liability for ISPs and others to encourage greater use of the Internet to disseminate copyrighted works.

3. Smart use of technology rather than the threat of litigation will better promote the interests of content owners and society in general.

Launch Media, Inc.

Summary of Intended Testimony of David Goldberg:

My name is David Goldberg and I am co-founder and Chief Executive Officer of Launch Media, Inc. ("LAUNCH"), a digital media company dedicated to creating the premier Internet music site, www.launch.com, by providing music fans with a wide selection of streaming audio, one of the Web's largest collections of music videos, exclusive artist features and music news covering substantially all genres of music.

In my testimony, I would focus on the policy justifications for amendment of Section 117 of the Copyright Act, 17 United States Code 117, to provide explicitly that it is not copyright infringement to make temporary digital copies of works that are incidental to the operation of a device in the course of a lawful use of a work (e.g. temporary "buffer" copies created during "streaming" of digital media). I would discuss three policy arguments in particular, namely that the proposed amendment (1) addresses legitimate concerns of content users without depriving copyright owners of any rights which Congress intended for them to have, (2) encourages the creation and broad distribution of content, and (3) would further electronic commerce and Internet growth. In light of my experience as an Internet webcaster, I would emphasize points 2 and 3 above – the impact of such an amendment on content creation and distribution, and on growth of electronic commerce and Internet activity.

We at LAUNCH have come to appreciate the power of the Internet from the content delivery perspective - both in terms of the geographic reach of the Internet for distribution purposes, as well as the sheer volume of content that can be delivered over the Internet. The proposed exemption would ensure that the Internet would remain a highly efficient distribution mechanism for digital content of every description by clarifying that the creation of temporary copies which are inherent to the process of digital distribution do not implicate copyrights. The proposed exemption would not obviate the need for companies like LAUNCH to respect the rights of content owners. Indeed, LAUNCH has already agreed to pay content owners, the record labels in this instance, more than traditional broadcasters pay for public performance rights in connection with streaming of audio and video music content. Rather, the proposed exemption would clarify that webcasting would not be subject to "double dipping" by the content owners in what would essentially amount to an unnecessary tax on Internet streaming activities.

So long as the Internet remains an efficient distribution mechanism for digital content, businesses like ours will continue to expand their online operations to take advantage of the medium. Whether digital content is offered free of charge or otherwise, commercial activity related to such content distribution, e.g. online advertising, merchandise sales, and content syndication, will continue to expand as well.

Absent the proposed amendment, online content distribution and the related commercial activities might shrink considerably due to a number of factors, chief among them uncertainty pending a resolution to the conflict between copyright owners and content distributors. While we at Launch believe that the creation of "buffer" copies of a work during "streaming" of such work does not constitute copyright infringement under current law, we continue to run our business under a cloud of uncertainty as long as copyright owners continue to insist that these temporary copies are, in fact, infringing. This uncertainty – like that created by the charge that our LAUNCHcast service constitutes interactive, rather than non-interactive, radio – is an unnecessary restraint on our business, as well as a deterrent to others who, but for this uncertainty, might choose to enter our industry. It is not in anyone's interest – webcasters or content owners – to resolve any perceived ambiguity in the copyright laws through litigation. Rather, this is a clear example of an instance in which legislative action could effectively resolve any uncertainty.

myplay, inc.

REQUEST TO TESTIFY — SUMMARY OF TESTIMONY

David Pakman, Founder and President Business Development & Public Policy, **myplay, inc.**
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TEMPORARY BUFFER-MEMORY COPIES FOR AUTHORIZED STREAMING SHOULD BE EXPLICITLY PLACED OUTSIDE THE COPYRIGHT OWNER'S MONOPOLY POWERS AND RIGHT TO DEMAND COMPENSATION

1. Evanescent buffer copies in buffer-memory are technically required for the transmission and playback of streams of music on the internet, both during transmission through the internet infrastructure and also at the ultimate destination, the user's personal computer.

2. The copies are not permanent; they bring no value to consumers and consumers will not pay for them. They are mere technical necessities, no different from the buffer copies made by terrestrial CD players, e-book readers, and other electronic players of digital material, as well as by the transmission through the internet infrastructure of online downloads. No copyright owner would dream of trying to collect extra fees for any of these uses.

3. If put to the test, these buffer-memory copies would undoubtedly be deemed a fair use, as mere incidental copies in the exercise of licensed rights of public performance that bear economic benefits to user and copyright owner alike. The same result should apply to fair use. However, the status of buffer-memory copies is currently not explicitly stated in the Copyright Act, and there is no rational basis to force myplay and similarly situated internet service providers to incur the burdens of litigation to establish this principle.

4. This clarification should exempt buffer-memory copies for all authorized transmissions and playback -- not just those that are licensed. This is necessary to embrace fair use which is of great importance to consumers, and integral to the myplay locker service -- *perhaps uniquely among current popular websites*.

5. Absent such clarification, myplay and similarly situated internet service providers would continue to be exposed to threats from owners of copyright, and their representatives, who take the position that those who stream audio files must pay not only public performance fees, but also for evanescent buffer-memory copies as if they were the equivalent of permanent downloads.

6. Myplay has studied customer usage patterns and the economic benefits that can be derived from that usage, and there is no rational business model that allows for payments for mere buffer-memory copies. If an obligation to make such payments were imposed, copyright owners would quickly suffer because legal use and proper compensation to owners would be greatly discouraged.

7. Copyright law should avoid obstructions to commerce and consumer enjoyment that seem to issue from the most trivial of technicalities. This is particularly advisable when clarifications of the law will have virtually no effect on a copyright owner's reasonable and just expectations for compensation. Copyright owners are entitled to -- and should be paid-- fees for public performance, but not for the buffer-memory copies that technically facilitate transmission and playback.

Broadcast Music, Inc.

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
and the
NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
U.S. DEPT. OF COMMERCE
Washington, D.C.

In the Matter of)
)
REPORT TO CONGRESS PURSUANT)
TO SECTION 104 OF THE DIGITAL) Docket No. 000522150-0287-02
MILLENNIUM COPYRIGHT ACT)
)

REQUEST TO TESTIFY

On October 23, 2000, the U.S. Copyright Office ("Office") and the National Telecommunications and Information Administration ("NTIA") issued a Notice of Public Hearing in the above-referenced proceeding to solicit written requests to testify from interested parties. See 65 Fed. Reg. 63626 (October 24, 2000) ("Notice").

In conformity with the Notice, Marvin L. Berenson requests to testify on behalf of BMI. Contact information is set forth in the signature block:

Set forth below is a one-page summary of the intended testimony.

Respectfully yours,

Marvin L. Berenson
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BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its 250,000 affiliated songwriters, composers and publishers, as well as thousands of foreign works through BMI's affiliation agreements with over sixty foreign performing right organizations. BMI, through Mr. Berenson's membership on the U.S. delegation, participated in the drafting of the WIPO Treaties in 1998 and BMI also played an important role in the enactment of the Digital Millennium Copyright Act of 1998. BMI's testimony would discuss three points made in its written reply comments already submitted in this proceeding.

I. The First Sale Doctrine Should Not Be Expanded To Digital Transmissions.

If Congress were to extend the exemption in Section 109 of the Copyright Act to the distribution right in Section 106(3) of the Act for digital transmissions of musical works, as was proposed by the Digital Media Association ("DiMA") and the Home Recording Rights Coalition ("HRRC"), and also proposed in Section 4 of H.R. 3048, 105th Cong. 1st Sess. (1997), a serious problem could arise because several exclusive rights in Section 106 are implicated by digital transmissions. BMI is concerned that such an exemption would be claimed by users to cover all other copyright rights in the "exempt" transmissions, including the right of public performance. Because this problem would be averted by leaving the section unchanged, BMI does not support an expansion of the first sale doctrine.

II. Section 117 Should Not Be Amended To Exempt The Reproduction Rights In Streaming Music.

In written comments submitted by one organization (DiMA), it was proposed that Section 117 of the Copyright Act be amended to exempt the reproduction right in streaming media, where a portion of the material is captured in a temporary "buffer" at the user's computer. BMI would testify that no change to Section 117 is warranted at this time.

III. The Record Store Exemption In Section 110(7) Should Not Be Extended To Online Record Stores.

In written comments, at least one party (DiMA) inappropriately exceeded the scope of this inquiry by suggesting that Section 110(7) should be amended to "clarify" that it applies to online music "stores." The NTIA and the Office should not consider this proposal. In the event that testimony on this proposal is permitted (bearing in mind that the Notice asks no questions about it), BMI believes that licensing music rights online is a more appropriate solution to the issue raised by DiMA. For example, BMI currently licenses a music service which provides music clips to online record stores, and this market would be lost if the exemption were to be enacted.

Time Warner Inc.

Summary of Proposed Testimony on Behalf of Time Warner Inc.
In Response to the Notice of Public Hearing
". . . on the effects of the amendments made by Title 1 of the Digital Millennium Copyright Act ('DMCA') and the development of electronic commerce on the operation of Sections 109 and 117 of Title 17, United States Code and the relationship between existing and emerging technology and the operation of such sections"

The policy justification against amending Section 109 to include digital transmissions is predicated on the fact that any such change would lead to unlimited and uncontrollable reproduction and distribution of any copyrighted work that became the subject of such a transmogrified "First Sale Doctrine".

The First Sale Doctrine from its inception as a judicially created principle and throughout its current life codified in Section 109 has been limited to the privilege given to the owner of a tangible copy of a copyrighted work to sell or otherwise dispose of the possession of that particular tangible copy. This principle was born in the book distribution business and was intended to prevent use of the Copyright Law as a tool for fixing the retail sales price of books. Accordingly, the doctrine was applied (i) only to tangible copies and (ii) only to tangible copies lawfully made under the Copyright Law and (iii) only in circumstances in which the transferor of such a copy did not retain a copy of what was transferred. In making such a transfer, the transferor is making a "distribution" but not exercising or infringing any of the other rights granted to the copyright owner by Section 102.

On the other hand, in the case of digital transmissions, the owner of the "copy" being transmitted in order to "sell or otherwise dispose of the possession of that copy," would be exercising at least one of the rights reserved and left undisturbed to the copyright owner, i. e., the right of reproduction. Moreover, because the digital transmitter retains the copyrighted work after making the transmission (unlike what happens under the First Sale Doctrine), that transmitter (or anyone receiving a digital transmission from her or him) can go through the same process over and over, thus making and distributing reproductions of the copyrighted work widely.

Accordingly, the proposed amendment to Section 109 would transform that section from a protection against restraint of alienation of particular copies to a device for allowing the owner of one copy to supply, without authority of the copyright holder, the needs and desires of a vast population.

This would render the reproduction right meaningless for all digitally downloaded works, as well as expanding the Section 109 exception to the distribution right beyond its intended boundary. Such a step would violate the U. S. obligations under Berne and TRIPs, particularly Article 9, paragraph (2) of Berne, which provides that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (emphasis supplied), and Article 9 of TRIPs, which provides that members shall comply with, *inter alia*, Article 9 of Berne.

The proposed legislation, H. R. 3048, would, at least in the present state of technology, not only not solve any of these problems, but would provide legislative underpinning for all of the dangers and damages flowing from the proposed expansion of the First Sale Doctrine.

It might be thought that "an amendment to Section 109 to include digital transmission" would be useful to libraries with respect to the activities referred to in the notice of public hearing. This would be a delusion. At best, content owners would be reluctant to make their works available in digital form. At worst, the creation of "works" would be greatly diminished to the disadvantage not only of libraries, but also of society generally.

Bernard R. Sorkin on behalf of Time Warner Inc.

Business Software Alliance

Pursuant to the Federal Register notice of October 24, 2000 (65 Fed. Reg. 63626), I submit the following request to testify at the public hearing on November 29, 2000:

1. Name: Emery Simon

2. Title and Organization: Counselor to BUSINESS SOFTWARE ALLIANCE

3. Contact information:

Emery Simon
Counselor
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Attached please find the one-page summary of testimony requested in the Notice. This request is made without prejudice to the ability of any of the member companies of the BSA to testify in their own right pursuant to a separate request. Thank you for your consideration of this request.

Emery Simon

Summary of Intended Testimony of

Emery Simon

on behalf of

The BUSINESS SOFTWARE ALLIANCE

November 22, 2000

The member companies of the Business Software Alliance do not support amending either section 109 or section 117 of the Copyright Act. The first sale doctrine continues to apply with full force in the digital environment. The backup and archival copying provisions of section 117 were recently amended by the Congress to address one issue: the status of RAM copies made in the course repair or maintenance. We believe that no other changes to this section are justified.

Certain of the written comments advocate extending first sale doctrine and imposing completely new limitations on other exclusive rights long enjoyed by copyright owners, notably the reproduction right. Such amendments would distort the development of electronic commerce in copyrighted materials, and threaten to facilitate piracy.

Other written comments recommended amending section 117 to enlarge the its scope. We oppose such changes. The Digital Millennium Copyright Act amended section 117, with the effect of reaffirming the long-standing principle that copies, regardless of their temporal duration, of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right.

Copyright protection against unauthorized "temporary copying" is crucial to ensure a healthy environment for the development of the software industry and e-commerce. It is the cornerstone of effective protection against unauthorized exploitation of a work in the digital, networked environment.

The phenomenal growth of the Internet and other digital networks offers tremendous possibilities for the development, enjoyment, use and commercial exploitation of all types of copyrighted works. For well over 100 years, international copyright law has been based on the premise that authors and other copyright holders must be given the ability to control the copying and distribution of their works to establish the necessary incentives to create new works. This bedrock principle is just as applicable in the new digital, networked environment as it has been in the physical world since the 1800's.

The current application of this principle requires recognition of the fact that "reproduction" involves the creation of copies of many forms made through a range of mechanisms. Thirty years ago, copies invariably took a physical form. With the creation of digital technologies and computer networks an individual now has the choice of exploiting a work through the use of physical copies or temporary digital copies. From the user's perspective these formats are indistinguishable, except that the exploitation of a work through the creation of a temporary digital copy may be far more convenient, enjoyable, and even less expensive that the exploitation of the work in physical format. There is no question that the exploitation of works will increasingly be through the creation of digital temporary copies as opposed to the creation of permanent copies.

RealNetworks, Inc.

Summary of Testimony of Alex Alben
Vice President, Government Affairs
RealNetworks, Inc.

RealNetworks, since its founding in 1994, has pioneered streaming technology as the ecommerce and broadcasting platform for audio and video over the Internet. As proof of the power of these technologies, more than 155 million unique users have downloaded the RealPlayer software for receiving streaming audio and video, and more than 45 million unique users have downloaded the RealJukebox application for organizing and personalizing music on their PCs. More than 350,000 hours of streaming content are available weekly over the Internet using RealNetworks technologies. Through partnerships with major recording labels and consumer electronics manufacturers, and participation in SDMI, RealNetworks has been working to facilitate secure commercial sale of music via digital downloading.

Since the release of the first RealAudio 1.0 streaming player in April 1995, legal issues have clouded prospects for new businesses based upon these new revolutionary technologies. One of the first of these issues was the threat that the temporary memory buffer, used to assemble and organize a few seconds of audio or video during the technical process of streaming, could be considered an infringement of copyright. Any attempt to either enjoin or charge for these transmissions, based on the temporary memory buffer, would have an immediate and potentially devastating impact on the developing streaming media business. While the streaming media business has steadily been growing in popularity, recently several prominent streaming content and programming companies have been forced to close or cut back their offerings in light of severe financial difficulties. Current licensing practices already impose substantial costs and administrative burdens upon these companies, and it would be untenable and unfair to require them to shoulder additional costs with respect to these buffer copies.

We strongly advocate explicit amendments to clarify that this temporary memory buffer made in the course of lawful streaming of media does not constitute either an act of copyright infringement or an "incidental digital phonorecord delivery" under 17 U.S.C.§ 115. An appropriate starting point for an amendment could be Section 6 of H.R. 3048, 105th Cong., 1st Sess. (1997). In response to a question posed in the Notice of Hearing, RealNetworks believes the better approach would be to immunize buffers that are incidental to a "lawful" use rather than an "authorized" use. This formulation would ensure that all lawful uses, and not just licensed uses, would be appropriately immunized from any claim of liability.

In addition, RealNetworks supports an express legislative acknowledgement of the first-sale doctrine for digitally-downloaded content. Consumers need and deserve the same rights for digitally-acquired content as for physical media. Restrictive license agreements imposed upon today's downloading consumers impede the development of legitimate ecommerce in music, and limit the inherent flexibility and value proposition offered by digitally-delivered content. Digital rights management tools can be employed by content owners that wish to secure retransmissions of downloads and assure that only one usable copy remains. Section 4 of H.R. 3048, cited above, provides a sound legislative basis to address digital first sale.

National Music Publishers' Association, Inc.

Summary

Testimony of the
National Music Publishers' Association

In NMPA's view, parties urging the expansion of the first sale doctrine have failed to demonstrate the need or appropriateness of legislative reform in this area. Supporters of a so-called "digital first sale doctrine" are not merely seeking application of the first sale doctrine to works in digital formats. Rather, they advocate a broad new exemption from rights of the copyright owner, which bears little resemblance, in scope or purpose, to the first sale doctrine as it exists today. The very nature of the electronic transfer of copies implicates not only the exclusive distribution right of the copyright owner – the only exclusive right to which the limited privilege in section 109(a) attaches -- but also many of the other exclusive rights established in section 106 of the Copyright Act. The attempt to shoe-horn activities that involve, at a minimum, the reproduction and distribution of works into the very narrow limitations of section 109(a) flies in the face of both the letter and intent of the first sale doctrine. Moreover, the greatly expanded privileges advocated by some commentors would disrupt ongoing efforts of copyright owners to reach innovative, marketplace solutions that promote consumer access to works via new technologies while assuring that copyright owners and creators receive fair compensation.

Similarly, several commentors have advocated a dramatic weakening of the reproduction right in all works through an amendment of section 117 of the Copyright Act. Virtually identical claims were made by some of the same parties during Congress's consideration of the DMCA. The suggestion that "section 117 of the Copyright Act should exempt archival and temporary copying for digital media" was without justification in 1998 and remains without justification today.

NMPA joins and supports the joint testimony of copyright industry associations.

Home Recording Rights Coalition

SUMMARY OF TESTIMONY
GARY KLEIN, VICE CHAIRMAN
HOME RECORDING RIGHTS COALITION

I. The First Sale Doctrine Should Be Updated for the Digital Era. Representatives Boucher and Campbell introduced H.R. 3048, the Digital Era Copyright Enhancement Act, late in 1997. As proposed, section 109(f) would have read:

> (f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays or distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement.

As Mr. Boucher noted, this provision "would permit electronic transmission of a lawfully acquired digital copy of a work as long as the person making the transfer eliminates (e.g., erases or destroys) the copy of the work from his or her system at substantially the same time as he or she makes the transfer. To avoid any risk that the mere act of making the transfer would be deemed an infringing act under existing section 116 of the Copyright Act, Section 4 of the proposed bill states that the "reproduction of the work, to the extent necessary for such performance, display, or distribution, is not an infringement."

Copyrighted content can be delivered to consumers with digital rights management (DRM) systems that enable secure electronic transfers of possession or ownership, and that protect against unauthorized retention of the transferred copy. Through technological processes such as encryption, authentication, and password-protection, copyright owners can ensure that digitally downloaded copies and phonorecords are either deleted after being transferred or are disabled (such as by permanently transferring with the content the only copy of the decryption key).

II. Section 117 Should Exempt Archival and Temporary Copying for Digital Media. The exemption set forth in section 117 of the Copyright Act implicates at least three types of copying of digital media today. Consumers should be able to make a back-up or archival copy or phonorecord of content that they lawfully acquire through digital downloading. Temporary copies of recorded content made in the course of playback through buffering, caching, or other means also should be exempt from claims of infringement. Because the technical process of Internet webcasting requires that a receiving device temporarily store a few seconds of data transmitted by a webcaster, before playing back the audio or video to the consumer, the law should recognize this process as well. Each of these types of temporary copying should already be deemed not to be copyright infringement under existing copyright law, including the doctrine of fair use. To eliminate any legal uncertainty that could ultimately hurt the interests of consumers or that could stifle the development of new technology, the legal status of these temporary non-infringing copies should be clarified.

Both H.R. 3048, the Boucher-Campbell bill, and S. 1146, the Digital Copyright Clarification and Technology Education Act of 1997 introduced by Senator John Ashcroft, would have provided for such clarification. The potential growth of electronic commerce--and the vast potential opportunities it creates for copyright owners, technology developers, hardware and software manufacturers, and media companies--demonstrates why section 117 should be expanded to address all forms of digital content, not just computer software.

Digital Media Association

Summary of Testimony for
Seth Greenstein and/or Jonathan Potter
on behalf of the DIGITAL MEDIA ASSOCIATION

The Digital Media Association (DiMA) wishes to testify with respect to the issues raised under both Sections 109 and 117 of the Copyright Act.

Section 109 For more than a century, international intellectual property policy has granted a right to transfer copies or phonorecords of a copyrighted work without further obligation to copyright owners. For ecommerce to flourish, consumers must be assured that digitally-downloaded purchases convey at least the same flexibility and value as physical media, including the right to resell, lend or give away media products. The economic and public policies underlying the first sale doctrine support extending this historical exemption into the digital environment. To the extent that this privilege is not already secured under current law, a legislative clarification to the first sale doctrine should permit the transfer of possession or ownership, via digital transmission, of media lawfully acquired by digital transmission. For media delivered using digital rights management or other technological protection methods, technology can ensure that only one usable copy or phonorecord remains after transfer. For media delivered without effective technological protection, the first sale doctrine should allow the sender to delete or disable access to the copy or phonorecord substantially contemporaneously with the transmission. This clarification would pose no greater risk to copyright owners than the current statute, yet would provide more protection than current law.

Section 117 DiMA strongly supports interpretive or legislative clarifications that, first, temporary buffer copies made in the course of using or performing digital media are not subject to the copyright owners' exclusive rights; and, second, consumers who acquire media via digital transmission are permitted to make an archival copy or phonorecord thereof. Regarding the first issue, temporary buffer copies made during the course of streaming audio or video are mere technological artifacts necessary to allow media transmitted using the IP protocol to be perceived as smoothly as radio or television broadcasts. These buffer copies have no independent commercial value and justly should be protected as fair use. But as the streaming media industry grows, so too does the risk to the industry from extravagant claims of certain copyright owners that such temporary copies infringe their rights under Sections 106 or 115. Therefore, the type of legislative clarification suggested by H.R. 3048, or by the Copyright Office with respect to such buffers used for distance education, should be adapted to cover Internet streaming.

As to the second issue, consumers may wish to make removable archive copies of digitally-acquired media so as to protect their purchases against losses. Despite the convenience of digital downloading, media collections on hard drives are vulnerable because of technical reasons, such as hard disk crashes, virus infection or file corruption; and practical reasons, such as the desire to upgrade to a new computer or the need to add more storage capacity. DiMA therefore supports amending Section 117 to apply to digitally-acquired media the right to make an archival or back-up copy.

All these rights should apply to "lawful" uses and copies, regardless of whether they are "authorized" by a copyright owner. This formulation preserves consumer rights under the fair use privilege, the exemption for private performances and displays (e.g., personal streaming from a locker service) and other exceptions and exemptions under the Copyright Act.

American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association

Summary of Intended Testimony by James G. Neal
on behalf of the American Library Community
November 29, 2000

The Nation's leading library associations (American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association) support the maintenance of a national copyright system characterized by balance and supportive of both proprietor rights and public access under the first sale doctrine. We are very concerned about technological advancements and a legal framework which threaten this public access and we support changes to the first-sale doctrine (currently 17 U.S.C. 109). We believe that with the implementation of the Digital Millennium Copyright Act, the first-sale doctrine is diminished and the ability of libraries to support the legitimate information access needs of their users is undermined while the ability of publishers to control and monitor use of works is expanded.

The first-sale doctrine must be viewed as media-neutral and technology-neutral. The rights and privileges provided in the Copyright Act are intended to operate as part of a system of checks and balances, with doctrines such as first-sale preventing remuneration rights of authors from chilling public access to works. We are concerned that current law may prevent the application of the first-sale doctrine to digital works, because it may apply only to the distribution right, and not the reproduction right; copying is fundamental to the use of electronic information. A first-sale doctrine for the "digital millennium" must embrace these points:

- interlibrary lending: policy should not make a distinction in lending based on the format of the work, and the rules on the interlibrary loans of digital works should be reaffirmed and strengthened
- unchaining works: all works acquired by a library should be available for use in classrooms, and by students and teachers, regardless where they are located
- preservation: libraries must be able to archive lawfully purchased works for future use and historical preservation
- disallowing unreasonable licensing restrictions: a uniform federal policy is needed which sets minimum standards respecting limitations on the exclusive rights of ownership and which sets aside state statutes and contractual terms which unduly restrict access rights
- donations: encourage donations of works to libraries irrespective of format and without threat of litigation to donors

The first-sale doctrine is being undermined by contract and restrictive licensing. The uncertainty faced by libraries about the application of the first-sale doctrine for digital works is having a negative impact on the marketplace for works in electronic form and on the ability of libraries to serve their users. Libraries believe that no review of the first-sale doctrine and computer licensing rules should be completed without the Congress giving favorable consideration to a new federal preemption provision affecting these rules.

Summary of Intended Testimony by Rodney J. Petersen
November 29, 2000

I bring several unique and important perspectives to the current inquiry. First, as a lawyer and educator I have a keen understanding and appreciation for the import of the federal copyright act and the resulting effort to strike an appropriate balance between the rights of copyright owners and users. Second, as a researcher and author I benefit from the access to scholarly works facilitated by research libraries as well as the protections afforded my creations under copyright law. Finally, as a member of the information technology division of one of the nation's premier research universities, my department is on the cutting-edge of teaching and learning with technology initiatives as well as the development of electronic commerce solutions.

The growing use and dependence upon digital materials for teaching, learning, and research is both an exciting and challenging endeavor for colleges and universities. The information age within which we live, work, and learn is predicated upon open access to information resources. "Open access" does not necessarily mean "free" or "unregulated"; however, the legal paradigm that governs information access and use in the digital economy must benefit the "public good." The "public good" is best advanced by policies and laws that provide appropriate incentives to authors and creators while at the same time ensuring appropriate access to information. As the comments of the library associations have reported, faculty and students are increasingly expecting and demanding access to information in digital form. Colleges and universities seeking to participate in the digital economy through experimentation and development of advanced technologies, including reaching remote learners through distance education, are increasingly frustrated by the impediments that result from a complex intellectual property system that benefits only a few.

The trend towards the displacement of the provisions of a uniform federal law (the United States Copyright Act) with licenses (or contracts) for digital information is of great concern: College and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of independent license terms. A typical license agreement will limit if not eliminate the availability of fundamental copyright provisions (such as "fair use" and ability for libraries to "archive and preserve" information) by characterizing the information transaction as a "license" rather than a "sale." It is misleading to contend that "freedom of contract" will prevail and that license negotiations are between entities with equal bargaining power, especially when non-profit educational institutions are usually presented with standard license agreements developed by the information providers. The enforceability of "shrinkwrap" or "clickthrough" licenses also poses the same restrictive use regime on individual students, faculty, and researchers. I am not convinced that copyright protections for authors and creators of digital materials is so much in peril that we must resort to a (non-uniform) system of individual licenses that also opens the floodgates for restrictions on otherwise legitimate uses.

The digital age necessitates that we enforce existing copyright laws and rely upon ethical principles and educational measures to protect the rights of authors and creators of digital works. The introduction of legal and technological measures that in turn diminish if not eliminate otherwise lawful uses is not in the public interest.

Recording Industry Association of America, Inc.

November 22, 2000

VIA ELECTRONIC MAIL

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Re: Public Hearings on Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act, Docket No. 000522150-0287-02

Dear Mr. Feder and Mr. Joyner:

Pursuant to the Copyright Office's notice at 65 Fed. Reg. 63626 (Oct. 24, 2000), the Recording Industry Association of America, Inc. ("RIAA") hereby requests to testify at the public hearings in the above-referenced proceeding scheduled for Washington, D.C. on November 29, 2000. The testimony will be presented by Cary Sherman, Senior Executive Vice President and General Counsel of RIAA. Attached is a one-page summary of Mr. Sherman's testimony.

Any questions regarding this request can be addressed to the following:

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Sincerely,

/s/

Steven R. Englund
Jule L. Sigall

Counsel for the Recording Industry
Association of America, Inc.

cc: Cary Sherman
Mitch Glazier

Attachment

Summary of Proposed Testimony of Cary Sherman,
Senior Executive Vice President and General Counsel,
Recording Industry Association of America, Inc. ("RIAA")

November 29, 2000

RIAA is a trade association whose members are responsible for the creation of over 90 percent of all legitimate sound recordings sold in this country. RIAA's members are actively engaged in the development of new business models for the delivery of music to consumers in digital format, and therefore have a significant interest in the subject of this public hearing and study – the relationship between the development of e-commerce and new technology and Section 109 of the Copyright Act.

RIAA's testimony will be directed towards the first set of questions raised in the Notice for these public hearings, namely, whether any policy justifications exist for amendments to Section 109 to address digital transmissions. RIAA believes that not only are amendments to copyright law not warranted, tampering with Section 109 in the ways suggested by some commenters would harm the developing digital music marketplace.

Some fundamental principles have been overlooked by those advocating changes to Section 109. First, Section 109 and the "first sale doctrine" it embodies simply limit the distribution right afforded to copyright owners as it relates to particular physical copies. It does not, as many have asserted, establish "rights" regarding the use of copyrighted works nor exemptions from any other exclusive rights of copyright owners. While we agree that a copy in digital format is entitled to the privileges in Section 109 like any other physical copy, Section 109 does not and should not permit reproduction or any other activity that would implicate other rights of the copyright owner.

Second, copyright is a form of property, and copyright owners must be able to capture the value of that property through the use of licenses and other contracts. Indeed, rapid development of new digital music business models will require the flexibility of contractual arrangements to meet the expectations of all parties involved, including consumers, distributors, recording artists and record companies, all of which can change quickly in this new environment. Furthermore, the use of technological measures to support the contractual agreements of the parties is also essential to the deployment of new music delivery methods.

Thus, the suggestion that Section 109 should be amended to address speculative concerns about the use of restrictive licenses or technological measures is misplaced. Developments in new digital music delivery systems – which, first and foremost, are being designed to meet the demands of music consumers – would be stifled by blunt legislative action, and the incentive to create these consumer-friendly models would decrease if such action were taken. Moreover, concerns about allegedly restrictive licensing practices can and should be addressed in the context of other areas of law more relevant to the alleged problems. The marketplace should be given an opportunity to resolve these important issues.

Supertracks, Inc.

Summary of Written Testimony for Charles Jennings, CEO of Supertracks, Inc

As founder and CEO of Supertracks, I believe I have a unique perspective regarding the issues of this hearing. Over the years, I have founded many successful technology-related companies focused on Internet privacy and the digital delivery of software, music, and video, including Truste, Preview Systems, and GeoTrust. I have also been successful in the creative side of business having been a former newspaper columnist and the author of six books, The Hundreth Window being the most recent. In addition, I was a film and television producer for Paramount and Warner Brothers, and I am a co-creator of the comic strip Pluggers.

There are several issues concerning the extension of the first sale doctrine to digital goods that I would like to address. First, content owners often fear losing control over their content once it's on the Internet in digital form. However, this fear, regardless of how tangible it may seem, is not justified given current technology. Technology is available that protects and prevents digital goods from unauthorized copying. We did it for music at Supertracks, and we did it for software at Preview Systems. For this reason, there is no longer a valid reason not to extend the same consumer rights to digital goods as those in the physical world. In fact, it is now possible to create greater copy protections for digital goods than those on a physical CD.

Legally, when digital goods are treated differently from physical goods, rules are imposed upon consumers that are not always in the consumer's best interest. In our experience with music at Supertracks, we found that content owners treated digital goods as licenses, not products. As a result, consumers had to contract for these licenses by "click through" agreements, meaning that consumer bargaining power was nonexistent and many restrictions were imposed upon them that would otherwise not be the case. By classifying a digital delivery in terms of a license rather than a sale, content owners can set prices in the market place for those licenses in ways they cannot set for products.

All consumers expect to own the digital product they buy and to have the same rights of ownership they have with physical goods. When their rights are different from or when access to digital goods is difficult due to measures implemented to protect imposed conditions, they are frustrated and far less inclined to make purchases. Since the key to digital commerce is acceptance by consumers, it must be ubiquitous, easy-to-access, and personally satisfying to use. Obviously, there is no market if consumers are not buying due to cumbersome usage rules.

A related issue is the archival copy exception in Section 117. Let me to return to the idea that a digital good bougnt by a consumer should be a good bought, not a good licensed, leased or sold in some other form of nonpermanent ownership. Consumers should be able to move or store, music they have purchased to other personal, non-commercial devices. They should be able to protect their investment by making archived copies for personal use, whether or not those copies are susceptible to destruction by mechanical or electrical failure. In the physical world, they already have this right. In the digital world, they don't.

This hearing seeks to determine why an exemption should exist permitting the making of temporary digital copies of works incidental to the operation of a device. One of the steps to digital delivery is the necessity of producing multiple copies of the same digital good on a server. Currently, there is no uniform technology for digital goods: often several copies need to be made in different formats to accommodate varying system requirements. These goods are then encrypted and sent to other servers, proxy servers, and routers in the network that make up the Internet. All of these copies are required as the data is passed along the network. Nevertheless, these copies are not the same as reproductions that constitute a product a consumer can access and use. This happens once the data reaches a machine, the PC for example, that can render the copy perceivable by a person. At that point, a potentially revenue generating event happens. Content owners are not losing out on potential revenue by the making of these various copies.

Charles Jennings, CEO Supertraks

supertracks

Motion Picture Association of America

Summary of Intended Testimony of

Fritz E. Attaway

on behalf of

MOTION PICTURE ASSOCIATION OF AMERICA

Section 104 of the Digital Millennium Copyright Act (DMCA) directs the Register of Copyrights and the Assistant Secretary for Communications and Information to jointly evaluate and report to Congress on:

1. the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United states Code; and
2. the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

This testimony addresses only section 109 of the Copyright Act, commonly referred to as the First Sale Doctrine.

Based on the record assembled in this proceeding, the Register and Assistant Secretary can come to only one clear and simple conclusion. That is, the DMCA and the development of electronic commerce have had no effect on the operation of the First Sale Doctrine, and the relationship between existing and emergent technology and the operation of the First Sale Doctrine is in harmony.

No evidence has been presented in this proceeding that would support any other conclusion. Those who demand that the DMCA be reopened and the First Sale Doctrine be amended offer as support only speculation about what future technology and marketing practices may (or may not) develop, and possible (and often impossible) hypothetical conflicts that could arise. Only time will tell whether any of this speculation is ever proven accurate. In the mean time, the duty of the Register and Assistant Secretary is to report what is known today, and what is known today is that the First Sale Doctrine is operating as it was intended and there is no demonstrated conflict, or even friction, between the implementation of the DMCA in the new electronic commerce environment and the exercise of the First Sale Doctrine.

Proposals to amend the First Sale Doctrine along the lines of section 4 of H.R. 3048, 105th Congress, are completely without justification and, more importantly, would not simply "modify" the First Sale Doctrine in light of the new technological environment. They would totally transform the First Sale Doctrine from a narrow limitation on the distribution right of copyright owners, to a broad constriction of the rights of copyright owners, including both the distribution right and the reproduction right. Such a major slashing of the rights of copyright owners would have a disastrous, adverse impact on the incentive to create copyrighted works, which is a primary purpose of the Copyright Act.

November 22, 2000

Digital Future Coalition

Summary of Intended Testimony of the Digital Future Coalition
Before
The United States Copyright Office, Library of Congress
And
The National Telecommunications and Information Administration,
United States Department of Commerce

The Digital Future Coalition ("DFC") represents 42 national organizations, which includes both owners and users of copyright materials. Our constituents support a balanced copyright system that protects proprietor's rights while at the same time permits access to the public under the "first sale" doctrine. The DFC supports modifications to the first-sale doctrine, currently codified at 17 U.S.C. Sec. 109, to address the growing issues resulting from ongoing technological advancements.

In the 105th Congress, for example, the DFC strongly supported H.R.3048 legislation to implement the WIPO Copyright Treaty and Performances and Phonograms Treaty. Unfortunately, the final text of the Digital Millennium Copyright Act of 1998 ("DMCA") did not address H.R.3048's suggestion to authorize individuals to perform, display, or distribute a copy or phonorecord. The DMCA did, however, direct the Copyright Office and the NTIA to undertake further study of the "first sale" doctrine in the context of the digital environment. The "first sale" doctrine and has allowed research libraries, second-hand bookstores, and video rental stores broad secondary dissemination. The DFC is concerned that if "first sale" is further restricted, progress of knowledge and advancement of ideas will be curtailed.

Comments from the 1995 *White Paper on Intellectual Property and the National Information Infrastructure* suggest the "first sale" doctrine should be inapplicable to electronic transmissions by consumers. The DFC believes that such suggested limitations in the *White Paper* and in the DMCA puts the doctrine at risk and could disrupt the balance of copyright law reform, which supports proprietor's rights. Under Sec. 1201 of Title 17, legal sanction and support threaten copyright owners' use of the "anti-circumvention" measures. The copyright industries support "second-level" access controls which restrict how a consumer first acquires a copy of a digital file and its subsequent use.

For example, the purchaser of a downloaded digital text file that is downloaded to a portable storage medium is permitted to transfer ownership of that "copy." However, new Chapter 12 provisions would make use of a password system or encryption device a violation of anti-circumvention measures that could be subject to penalties. Similarly, Sec. 117, which permits purchasers of software program copies to disseminate the copies, could also be at risk under the new anti-circumvention laws. Software consumer rights have been deemed essential since 1980, when the "final compromise" of the 1976 Copyright Act was adopted. Legal support afforded by the DMCA and recent case law will allow some vendors to limit the effective scope of Sec. 117.

To prevent vendors from taking advantage of these restrictions imposed by the DMCA, the DFC proposes adoption of language contained in both S.1146 and H.R.3048, as introduced in the 105th Congress. In short, the language would provide that a digital copy, notwithstanding Sec. 106, is not an infringement if it is incidental to the operation of a device while using the work and if the copying does not conflict with normal exploitation of the work. Finally, ambiguity remains over the use of "shrink-wrap" and "click-through" licenses to override consumer privileges codified in the Copyright Act. When the DMCA was enacted, the DFC anticipated clarification of the Uniform Computer Information Transactions Act ("UCITA"). The final text of UCITA, now before state legislatures, does not fulfill the DFC's expectations.

To advance the rights under the "first sale" doctrine, DFC believes that recommendations to Congress should focus on formulating a restatement of the "first sale" doctrine in the context of digital copies. First, Sec. 117 places the burden on the proponents of change to maintain the balance of copyright interests established in 1980 by preserving exemptions. Second, Sec. 1201(k)(2) of the DMCA limits the use of anti-circumvention measures and provides a legislative precedent for such limitations on technological self-help. Lastly, amendments to 17 U.S.C. Sec. 301 would provide guidance to consumer privileges under copyright over state contract rules regarding "shrink-wrap" and "click-through" licenses.

Digital Commerce Coalition

Summary Proposed Testimony of the Digital Commerce Coalition
RE: Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act

As a general matter, Digital Commerce Coalition ("DCC") feels it important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. The Uniform Computer Information Transactions Act ("UCITA") is a new model commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). As with the Uniform Commercial Code, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce.

UCITA is intentionally broad in scope. The intent is to cover all materials and information that may be the subject of electronic commerce. Thus, the Act covers "computer information," and covers transaction for software, electronic information – including copyrighted works – and internet access. As has been traditionally the case with uniform laws in this area, UCITA sets rules governing agreements between private parties in the licensing of computer information. It does not create or alter the property interests that persons may enjoy in respect to these products. Those property interests are determined by relevant state and federal laws, including the federal Copyright Act. This careful balance is one upheld by the courts as necessary to the effective and efficient provision and use of information, and one that both the federal and state governments must strive to maintain.

In this context, DCC is concerned that the comments submitted by Digital Future Coalition ("DFC") and the Libraries go to issues far beyond the scope of the study mandated by Congress. In so doing, they confuse the distinctions between federal copyright law and state contract and licensing statutes. Given the importance of licensing to the information industries and their customers, as well as their reliance upon contracts for flexibility and product variety, this concern is of no small moment.

DFC's and the Libraries' comments would lead an uninformed reader to the conclusion that UCITA ignores the supremacy of federal law. To set the record straight, Section 105 of UCITA does contain specific reference to the supremacy of federal law and does so in the context appropriate to a state-created statute governing contracts and licenses. Both DFC and the Libraries request that the study recommend amendment to 17 U.S.C. 301 that would interfere with states' rights to govern agreements between private parties. It is a long accepted principle of American jurisprudence that parties should be free to form contracts as they see fit. Provided such contracts are not unconscionable, or illegal, UCITA – consistent with long established practice and jurisprudence – sets up rules as to when a contract is formed and lays out the respective parties rights and obligations.

With this in mind, we believe that the requests made in the submissions by DFC and the Libraries are based on anecdotal evidence and unattributed terms from contracts presumably negotiated between licensors and licensees, and that before Congress determines to override state contracting rules, concrete evidence of problems in the marketplace must be presented. To date, DCC is unaware of any such evidence. Rather, the experience of DCC members – particularly those that market to the library and university communities – demonstrates that such licensees are quite skilled in negotiating terms and conditions that allow for special uses beyond those offered in the commercial or consumer marketplace. If there is any area of uncertainty, it lies in the lack of uniformity in the default rules that states must establish to govern transactions in computer information, and UCITA will serve to establish greater certainty, so that licensors and licensees of computer information can be clear on what rights and limitations are granted under private contractual agreements.

UCITA is intended to help facilitate the new electronic commerce that is dependent on licensing of computer information – including software, electronic information and internet access. As has been traditionally the case under U.S. law, UCITA is designed to complement the provisions of federal law. This state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies – including the applicability of the Copyright Act's fair use exceptions and the latest provisions of DMCA. To do otherwise would have risked disturbing, or even destroying, the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties, including contracts and licenses. Similarly, for Congress to accede to the requests of DFC and the Libraries would undermine that same balance and introduce unjustified proscriptions that will only stifle the emerging marketplace for electronic commerce.

National Association of Recording Merchandisers

Summary of testimony of Pamela Horovitz, President
National Association of Recording Merchandisers ("NARM")
On behalf of NARM

NARM is the national trade association representing music retailers, rackjobbers and distributors. Some of our members also sell books and audiovisual works. NARM members include single-store businesses, large retail store chains, and mass merchants. Also, its members include businesses retailing exclusively through the Internet, exclusively through a physical store, and a combination of the two. Of those retailing through the Internet, the methods include sales of physical goods and so-called "digital distribution" by downloads, authorized through a license to the consumer to make a phonorecord on the consumer's own tangible medium, or by a license to make a phonorecord in a kiosk located in a retail location and which is then sold by the retail store to the consumer.

In all of these business models, NARM members have enjoyed their right under the first sale doctrine and Section 109 of the Copyright Act to develop their own customers, establish their own competitive prices, and distribute copies and phonorecords without the consent of the copyright owners involved. NARM members also benefit from the first sale doctrine and Section 109 rights of their customers, because the right to transfer lawfully made phonorecords by sale, gift or bequest increases the value of the phonorecord to the consumer (and furthers the constitutional objective in authorizing copyrights).

NARM members are extremely concerned that the anti-circumvention provisions in Section 1201(a)(1) of the DMCA are being used as a sword to nullify Section 109 and other first sale doctrine rights, rather than as a shield to protect copyrights. Similarly, efforts are currently underway among major copyright owners to use contracts of adhesion to purportedly obtain an agreement to waive Section 109 rights as a condition of purchasing or being given access to lawfully made copies and phonorecords. These unilateral terms prohibit uses of a copyrighted work in areas in which the copyright owners own no rights. The terms are being supported by emerging state laws which would enforce them, and by technological controls which make it unnecessary to seek agreement from the other party. Indeed, the new technological controls preventing lawful use, which give copyright owners the ability to either prevent or render worthless the exercise of any Section 109 right of transfer of possession or ownership, are further being protected by the same technological measures intended to control access to the copyrighted work, such that NARM members and their customers will be unable to disable the technological restraint on Section 109 rights without also violating Section 1201(a)(1).

If given the opportunity to testify, Ms. Horovitz' is prepared to explain these concerns, give concrete examples of actual market efforts to so prevent the exercise of Section 109 rights, and explain why it would frustrate the constitutional foundations of copyright law to permit such conduct to continue unabated. NARM believes that Section 109, if properly interpreted and applied, does not need to be amended. If, however, the use of contracts of adhesion protected by novel state laws and/or misuse of technological restrictions protected from circumvention by Section 1201(a) are not restrained by 1201(c), by the courts or by administrative rule, then new legislation will be required to return the careful balance of copyright law to its original state.

Video Software Dealers Association

Summary of testimony of Crossan "Bo" Andersen, President
Video Software Dealers Association ("VSDA")
On behalf of VSDA

VSDA is the national trade association representing home video retailers and distributors. The majority of VSDA's members are companies operating video rental stores, sometimes referred to as "rentailers," who purchase copies of motion pictures and other audiovisual works (including video games) for rental, either in videocassette or digital DVD format. VSDA members are in a unique position to comment on the first sale doctrine, and the implications of Section 109 of the Copyright Act, because home video rental would not exist today but for the first sale doctrine and Section 109.

In 1983 and after the Supreme Court validated the Betamax technology in 1984, some motion picture companies attempted to shut down the home video rental market – or at least gain control over it – by appealing to Congress to create an exception to Section 109 to prohibit the rental of copies of motion pictures and other audiovisual works without the consent of the copyright owner. As a direct result of the vision of thousands of early video rentailers, who were more often seen as opportunists than entrepreneurs, the home video market was born.

The dire warnings of the motion picture copyright owners proved to be hyperbole. Within a short time, studio revenues from the independent home video market exceeded their combined revenues from the theatrical box office and all other sources of licensing revenue. Moreover, this failed attempt to restrict the first sale doctrine resulted in the furtherance of the primary goal of copyright law: "To promote the Progress of Science and the useful Arts" by creating a new and robust economic incentive for creative authors and artists to produce and disseminate their works. More importantly, it brought economical motion picture entertainment into homes in virtually every neighborhood.

As the devices for playing digital works move from simple play-back devices to more sophisticated interactive ones, copyright owners too often have seized upon the opportunity to control through technology what they cannot control by law. The lessons learned over the last twenty years are soon forgotten, as technology allows copyright owners to prevent the very activity specifically reserved to the owners of lawfully made copies under Section 109 without the consent of the copyright owner.

Based upon this history and concrete industry experience, Mr. Andersen's testimony will illustrate how Section 109 has been used in the home video industry to broaden distribution of and consumer access to copies of audiovisual works with full remuneration to the copyright owners, and to posit how consumers' beneficial enjoyment of Section 109 may be harmed under emerging business models designed to circumvent Section 109. He will illustrate that Section 109 has not only created the most lucrative source of revenue for copyright owners in motion pictures, but at the same time has created the most affordable way for American families to enjoy the commercial-free full-length motion picture viewing experience. Mr. Andersen is prepared to give examples of present and past efforts to control, limit or prohibit subsequent distribution through exclusive dealing arrangements, restrictive licenses, notices or warnings, and pricing. He will postulate and query how access control technology righteously may be deployed to protect against piracy and yet give consumers and retailers maximum opportunities to use and market copies which copyright owners have already sold and for which they have been fully compensated.

Intertrust Technologies Corporation

PUBLIC HEARING OF U.S. COPYRIGHT OFFICE AND NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION ON REPORT TO CONGRESS PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

NOVEMBER 29, 2000

SUMMARY OF TESTIMONY BY NIC GARNETT, VICE PRESIDENT OF TRUST UTILITY, INTERTRUST TECHNOLOGIES CORPORATION

InterTrust Technologies Corporation is a developer and provider of sophisticated Digital Rights Management (DRM) technology and solutions, which have been the subject of comments by a number of organizations participating in this study. As a DRM provider, InterTrust can lend insight into the state of DRM technology and its deployment by our customers – copyright owners and aggregators and disseminators of copyrighted works – in electronic commerce.

Electronic commerce in copyrighted works has noticeably lagged due to the lack of a trusted and consistent environment that neutrally supports the rights of both owners and users of copyrighted works. For the digital economy to continue to grow and flourish, creators, publishers, and distributors of digital content, as well as service providers, governments and other institutions, and users, must have the ability to create digital content secure in the knowledge that their ownership rights can be protected, and to associate rights and rules regarding ownership, access, payment, copying, and other exploitation of the work. By providing the means to do so, DRM is making an essential contribution to the development of electronic commerce.

Effective DRM solutions, such as those provided by InterTrust and its partners, comprise technological measures as well as a trusted neutral third party administrator to protect the integrity of the technology and manage its continual adaptation – including the development of rights and permissions practices - to changing technology and user needs. The purpose of DRM solutions is thus three-fold – (i) to enable copyright owners to manage their exclusive rights effectively throughout the electronic commerce value chain, (ii) to provide flexibility in the arrangements struck between copyright owners and their customers, and (iii) to provide a trusted environment in which technology guarantees these arrangements. The promise of such sophisticated DRM solutions is to instill confidence in electronic commerce among copyright owners and users of copyright works alike.

Thus, sophisticated DRM solutions are entirely consistent with the underlying balance of copyright law – to protect the rights of copyright owners as a means of promoting wider dissemination of and greater access to copyrighted works. Because digital delivery and DRM appear to be improving the dissemination and use of copyrighted works, concerns about their effect on the first sale doctrine – Section 109 of the Copyright Act – appear to be at best premature. Indeed, great caution should be exercised in considering proposals to alter such a fundamental tenet of copyright law because doing so could unsettle long established legal rights, thus making electronic commerce more uncertain. Moreover, such changes could constrain the development and use of sophisticated DRM technologies and solutions, which remain in their formative stages. The unfortunate result would be to discourage the lively experimentation necessary to develop viable, sustainable electronic commerce in copyrighted works.

Sputnik7.com

Dear Honorable Members Of The Committee,

The following is a brief outline of my testimony regarding the 104 hearings;

First Sale Doctrine – I fully support the rights of the consumer to give away or sell their legally purchased copy of a musical recording. As a songwriter and recording artist, I understand the need to protect the Artist and Copyright Holder in regards to these matters. I feel that it is of the utmost importance that the industry finds ways to update and interpret the copyright laws that we have in place and take into consideration the needs of consumers and the new methods of e-commerce and digital distribution

Archival Copying - I fully support the rights of the consumer to protect their legally purchased musical recording, by making archival copies to compact disk and other stable formats that are secure and free from threats of viral destruction and technological malfunctions.

Temporary copying in RAM for streaming - I am fully in support of allowing temporary copying of music and visual files into RAM for the purposes of streaming media performances. Preventing this type of buffering could cripple the future of streaming media and would prevent consumers from the opportunity to have an enjoyable streaming entertainment experience on the Internet.

Additional topics that I am interested in discussing would be extending the compulsory license to cover music videos, and the need for an international solution regarding the topics above.

Thank you in advance for considering my testimony and please feel free to contact me if you need any additional information.

Sincerely,

David Beal
CEO
Sputnik7.com
www.sputnik7.com

Association of American Publishers

Summary of Intended Testimony
Of
Allan R. Adler
Vice President for Legal and Governmental Affairs
Association of American Publishers, Inc.

November 29, 2000

In general, the views of the Association of American Publishers ("AAP") regarding the issues under examination by the Copyright Office and the National Telecommunications and Information Administration ("NTIA") for the Report to Congress mandated by Section 104 of the Digital Millennium Copyright Act have already been provided to these agencies for the record through Initial Comments and Reply Comments that were jointly submitted by AAP, the American Film Marketing Association, the Business Software Alliance, the Motion Picture Association of America, and the Recording Industry Association of America.

My purpose in testifying on behalf of AAP is not to repeat the contents of those joint submissions, but instead to address several issues raised by the hearing notice in the Federal Register of October 24, 2000 insofar as it asked a Specific Question regarding "the impact an amendment to Section 109 to include digital transmissions would have on the following activities of libraries with respect to works in digital form: (1) interlibrary lending; (2) use of works outside the physical confines of a library; (3) preservation and (4) receipt and use of donated materials."

AAP believes that such an amendment to Section 109 would radically transform the traditional role of libraries in our society. More importantly, it would do so at the expense of authors and publishers trying to utilize the same digital network capabilities that are coveted by the library community to legally exploit their copyrights through the introduction of new formats and business models for making literary works available in a competitive global marketplace. Because of its potentially crippling impact on the commercial market for "e-books" and "print-on-demand" services (among others), AAP believes the implications of such a proposed amendment must be determined in the context of the library community's espoused positions regarding contractual licensing and the circumvention of technological measures.

MusicMatch Inc.

MusicMatch Inc.
Bob Ohlweiler, Senior Vice President of Business Development
Summary of Testimony
November 24, 2000

MusicMatch has created products and services that utilize the Internet and other technologies to enhance consumer's enjoyment and discovery of music. 11 million consumers have aggregated their music onto their PC's with MusicMatch Jukebox and have significantly increased their consumption and purchase of music. Several million consumers have opted into MusicMatch personalized music services that enhance consumer benefit even further.

Products like MusicMatch Jukebox and MusicMatch Radio promise to provide consumers with a personalized, effortless and efficient way to fill their lives with music. The ability of a consumer to virtual-access and enjoy their music collection and personalized music services from anywhere in their home, car or office will delight consumers and expand the market for pre-recorded music. Accessing new or forgotten music will be as easy as changing channels on your television.

This consumer music ecosystem depends on further household penetration of broadband internet access, cost reductions in bandwidth and reasonable/equitable copyright law which facilitates technical and business model innovation as well as consumer access to their music.

The rights in play within Section 104 of the DMCA are pivotal issues for the creation of such music services:

- Payment for copyright holders should be equitable across various channels of distribution, and business models. Once a consumer has compensated the copyright holder by purchasing the music or purchasing access to the music, additional restrictions or costs for the transmission (including buffering) of that music to another location where that consumer listens to it are not reasonable.
- Consumers must also be free to make archival copies as well as copies that they can take to devices unable to play the digital music in its electronic format. (i.e. the CD player in their car)

MusicMatch spends a relatively large portion of our research and development budget in developing technologies that protect copyrighted works from being pirated while in transit to the consumer. Such safeguards, like locks on CD delivery trucks or anti-theft devices in retail, should be deployed to prevent the piracy feared by the copyright holders. Adding additional licensing burdens and unwarranted royalty costs will not increase piracy safeguards.

Appendix 9

Transcript of November 29, 2000 Public Hearing Held Pursuant to 65 FR 63626

UNITED STATES OF AMERICA

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COPYRIGHT OFFICE

AND

NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION

+ + + + +

JOINT STUDY ON 17 U.S.C. SECTIONS 109 AND 117

PUBLIC HEARING

+ + + + +

WEDNESDAY,

NOVEMBER 29, 2000

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The hearing came to order at 9:30 a.m. in room 441, the Madison Building of the Library of Congress, 101 Independence Avenue, S.E., Washington, D.C., Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

Hon. Marybeth Peters, Register of Copyrights

Hon. Gregory L. Rohde, Assistant Secretary of Commerce for Communications and Information

Jesse Feder, Policy Planning Advisor

David Carson, Esq., General Counsel

Jeffrey E. M. Joyner, Esq., Senior Counsel, NTIA

Marla Poor, Esq., Attorney Advisor

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P-R-O-C-E-E-D-I-N-G-S

(9:30 a.m.)

MS. PETERS: Good morning and welcome. Those of you who do business before the Copyright Arbitration Royalty Panel know that the chairs that you are sitting in are not the usual chairs and they are not quite as comfortable. We really didn't mean to make you uncomfortable. It's just we tried to get seats for more people.

As you know, today's hearing is being conducted in connection with the study that Congress required of the Copyright Office and the National Telecommunications and Information Administration.

It's carried out under Section 104 of the Digital Millennium Copyright Act of 1998. The purpose of today's hearing is to provide our two agencies with additional evidence, information and insights in order to flesh out the views and proposals made to us during the public comment period.

All of the summaries of testimony that have been provided to us are already available on our website, and a transcript of today's hearing will be posted in about two weeks.

On my immediate right is Greg Rohde, the Assistant Secretary of Commerce for Communications and

Information, who will now make a few opening remarks. I will follow with some additional opening remarks when he finishes. Greg.

MR. ROHDE: Thank you so much, Marybeth for holding this hearing. First of all, I wanted to apologize in advance. I'm going to have to leave this hearing early. I have to go travel with a senator from my authorizing committee, Senator Cleland down to Georgia. When senators in your authorizing committee ask you to go, you say yes. I have to leave early and I apologize for that.

I feel ill equipped to be wrestling with these issues. When I was in graduate school I wasn't studying law. I was studying things like St. Thomas Aquinas Summa Theologica. My background is more in the classical and theology.

It strikes me that back in the middle ages monks would painstakingly sit and copy documents, scriptures, and works of Aristotle and Plato and in those days, and like St. Thomas Aquinas, they weren't wrestling a lot with the questions of how do you protect the copyright of the original owner. They had never heard of St. Gerome suing anybody for somebody copying his work.

Then came the invention of the printing

press and as technology developed, it creates new opportunity to spread information and knowledge throughout our society. At the same time, it creates a new challenge.

Now we live in the era of the Internet which I believe is making as profound an effect on our society as the printing press did in its day because of what it's doing to allow people to share information, to share knowledge.

But at the same time this new opportunity poses a very significant challenge for us and how we continue to protect a very important right, and that is the right of those who produce these works, those who produce books, those who produce movies, those who produce music.

In this very building there is one of the earliest recording devices around. I have actually had a chance to see it a few years ago. Down in the basement in the Music Division you have one of the earliest recording devices. It's a steel cylinder. I don't know how it actually works but it's one of the earliest recording devices that we have.

In addition to that, this building houses what I think is one of the great cultural treasures of our American society, and that is the entire music collection of Duke Ellington.

It really is a wonderful thing that today in our time that not only do we have like original scores of like the music of people like Duke Ellington, but we can also have original recordings. It's wonderful that we can now have this information shared.

But at the same time in a digital era when you have broadband communication networks, when you have the ability with digital technologies to recreate a work perfectly and now have it accessed into this network, it raises very, very significant challenges on how you protect the copyrights which is very important.

It's clear to me in my reading of the legislative history and in the statute that when Congress implemented the Digital Millennium Copyright Act and passed that, Congress truly was wrestling with this balancing that we need to do.

There is no clear easy answer to these questions. In reading through the testimonies and the written comments that we've received so far, it's clear to me that we have a lot of very significant issues to grapple with.

The reason why Congress charged our two

agencies with doing a report is because these issues continue to be looked at and we need to strive to work for that balance.

I'm very appreciative of the opportunity to be here for this hearing. I think this is going to be extremely helpful to us as we conduct and proceed with these recommendations that we provide to Congress.

I'm very grateful for the witnesses of this panel as well as subsequent panels for providing us with your insight and the information is going to be extremely helpful to us. Thank you.

MS. PETERS: Thank you. In 1997 and 1998 when Congress was considering the DMCA, Congressman Boucher and Congressman Campbell introduced a bill that contained a number of proposals, several of which we will hear repeated in testimony today.

At that time, based on the evidence available to it, Congress made a decision not to adopt those proposals and instead asked our two agencies to study the issues and report back.

One of these proposals is to modify Section 109 of the Copyright Act to make the first sale privilege apply expressly to digital transmissions of copyrighted works.

Section 109 is a codification of a judicial limitation on a copyright owner's distribution right that developed early in the 20th century. At that time the issue before the Supreme Court was whether a publisher could maintain control over the resale price of books through its exclusive right to "vend," -- i.e., sale.

In developing the first-sale doctrine the courts focused on two rationales, (1) the common law dislike of restraints on alienation of tangible property, and (2) the national policy against restraints on trade.

It would really be helpful to us in preparing our report and recommendations if participants who are addressing the issue of "digital first sale" would explain how the current proposals relate to the rationales that underpin the existing first-sale doctrine. In other words, if you are recommending a change explain how they would push the reasons for that doctrine forward.

A related issue with regard to Section 109 of title 17 has to do with activities of libraries. It would really help us if participants could provide us with concrete, real-world examples of the effect of current law on the important work of libraries, and how the legislative proposals that have been suggested to us will change that effect.

Apart from Section 109, we've been asked to look at Section 117. Section 117 permits the owner of a copy of a computer program to copy or adapt that program in order to make a backup copy or as an essential step in using the program in a machine.

In 1980, on the recommendation of CONTU, Congress amended Section 117 to address two problems. One was the fact that you needed an exemption in order to allow you to use the work. That is the essential step. The second one, making copies of a computer program was necessary "to guard against destruction or damage by mechanical or electrical failure."

If you look at the written comments and summaries of proposed testimony, there's different views on whether section 117 should be expanded in some way or whether you can take it away because it's no longer needed.

If you look at the court cases, section 117 has been construed pretty narrowly. What we need to hear in your testimony is how your proposals really relate to the underlying purposes that were embodied in Section 117. What real-world concrete problems are you seeking to address in the proposals that you are making today?

There are also a number of witnesses who will testify that we need exceptions from the reproduction right to make temporary copies. This is another proposal that was considered in the Boucher/Campbell bill.

Again, of course, that wasn't adopted back in 1998. Anything that you could give us with regard to what's changed in the last two years and why it's appropriate to rethink those issues would be helpful.

Obviously, as the Assistant Secretary said, the proposals that have been made in the comments raise complex and difficult questions. One of the things that we have to be mindful of is unintended consequences. To the extent that anyone who is proposing change -- or even those who oppose change -- can identify possible unintended consequences, that will help us.

I want to thank everybody ahead of time for participating in the hearing. I think we are going to go to our first panel which is seated here. Before we do that, I would like to introduce the rest of the Government panel.

To my immediate left is the Copyright Office's General Counsel David Carson. To his left is

Jesse Feder, Policy Planning Advisor in the Office of Policy and International Affairs. Any of you who have been working in this area know that Jesse is the contact person for the Copyright Office.

To Mr. Rohde's immediate right we have Jeff Joyner who is the Senior Counsel at NTIA. He is the point person for NTIA and some of you may have been working with him already.

To Jeff's immediate right is Marla Poor who is an Attorney Advisor in the Office of Policy and International Affairs.

Our first panel has seated itself and we have Jim Neal and Rodney Petersen representing the Library Associations. For the Association of American Publishers there's Allan Adler. Time Warner, Bernie Sorkin. Motion Picture Association, Fritz Attaway.

I'm going to start with the Library Associations and ask those representing the copyright interest to figure out the order in which you want to speak. You can go down the line. You can go in the order or whatever.

Let's start with Jim.

MR. NEAL: Good morning. My name is Jim Neal and I'm the Dean of University Libraries at Johns

Hopkins University. I speak today on behalf of the American Library Community and I'm joined by my good colleague from the University of Maryland, Rodney Petersen.

This is the third time I am providing testimony before the U.S. Copyright Office, first time with NTIA, on an aspect of the Digital Millennium Copyright Act. My focus has been the need to preserve existing exceptions and limitations in the copyright law under the impact of technological advances and under the impact of new regimes of intellectual protection.

First, I advocated a preemption provision for distance learning activities in libraries and educational institutions. I think this is very relevant to our deliberations today.

Second, I advocated the legal ability of information users to circumvent technological controls for noninfringing purposes. This I agree is relevant to our deliberations today.

Now, third, I ask that you embrace a media neutral, technology neutral application of the first-sale doctrine and an essential extension of the exception limits to the distribution rights of copyright holders for digital works.

I should add that I have also been at these tables in Washington fighting for limited database legislation and at countless tables in Annapolis seeking to neutralize the very burdensome elements of the UCITA legislation, both of which I feel threatens significantly public access to information and the balance that is so essential in our copyright law. I believe these are also very relevant to our deliberations today.

I believe it was an Anglican Bishop who said to an Episcopal Bishop, "Brother, we both serve the Lord, you in your way and I in His." In that spirit -- and this is certainly in the spirit of Greg's education -- you will note a pattern in my participation in these ongoing deliberations and debates. Library users, the public is losing.

I would also maintain that the vitality and productivity of learning, research, personal growth, economic development, creativity are seriously threatened.

As noted in my written testimony, we need a first-sale doctrine for the digital millennium that embraces several points. These relate to real examples and real experiences in the life of libraries and their users.

Policy should not make a distinction in lending based on the format of the work and the rules on interlibrary loan of digital works should be reaffirmed and strengthened.

All works acquired by a library should be available for use in classrooms and by students and teachers regardless of where they are located. This is a reality of the current educational environment in which colleges, universities, and libraries are participating.

Libraries must be able to archive lawfully purchased work for future use and historical preservation. A uniform federal policy is needed which sets minimum standards respecting limitations on the exclusive rights of ownership and which sets aside state statutes and contractual terms which unduly restrict access rights.

Lastly, we must encourage donations of works to libraries irrespective of format and without threat of litigation to those who donate those materials.

These five examples represent real world experiences that we are having in the library community and which align, I think, very much with issues of first-sale doctrine.

The first-sale doctrine is being undermined by contract and restrictive licensing. We face uncertainty in libraries about the application of the first-sale doctrine for digital works. I believe this is having a negative impact on the marketplace for works in electronic form and on the ability of libraries to serve their users.

We believe that no review of the first sale doctrine and computer licensing rules should be completed without the Congress giving favorable consideration to a new federal preemption provision affecting these rules.

One could say that every snowflake -- every snowflake in an avalanche pleads not guilty. Each chip we make in our powerful and hard-earned copyright tradition in this country brings us closer to a collapse in the balance and a burying of user's needs and rights.

MR. PETERSEN: Good morning. My name is Rodney Petersen and I am the Director of Policy and Planning at the University of Maryland's Office of Information Technology. Like Jim I'm here today on behalf of the National Library Associations.

I want to actually supplement some of

Jim's comments by bringing my own unique perspectives to the table and share with you what I think has relevance to this inquiry.

First, as a lawyer and educator and actually someone who teaches an online course on copyright and new media, I have a keen understanding and appreciation for the importance of the Federal Copyright Act and the resulting effort to strike an appropriate balance between the rights of copyright owners and users.

Secondly, as a researcher and author I myself benefit from the protections afforded under the copyright law. As you can imagine, universities are typically in the unique position of being both creators and users of copyrighted materials on a frequent basis.

Finally, and perhaps most importantly for this morning, as a member of the Information Technology Division of one of the nation's premier research universities, my department is on the cutting edge of teaching and learning with technology initiatives, as well as the development of e-commerce solutions.

From that last point of view I would like to offer a few examples and illustrations. The growing use and dependence upon digital materials for teaching, learning, and research, as was said earlier, is both exciting in terms of opportunities and challenging endeavor for colleges and universities.

The information age within which we live, work, and learn is prevocated upon access to information resources, open access that does not necessarily mean that it's free or that it's unregulated. However, the legal paradigm that governs information access and use in the digital economy must benefit the public good.

The public good is best advanced by policies and laws that provide appropriate incentives to authors, creators, while at the same time insuring appropriate access to the information.

As the written comments of the Library Associations have reported, faculty and students are increasingly expecting and demanding access to information in digital form. In fact, it's offices like my own who are teaching faculty how to incorporate technology into the learning process that are leading that effort.

However, at the same time our faculty and our universities are increasingly frustrated by the impediments that result from a complex intellectual property system that seems to be, as Jim described, becoming a losing battle for colleges and universities that seemingly only benefits a few.

Let me just give you a few examples of uses that I am concerns about and that I hope will prevail into the future. In fact, a couple of weeks ago I purchased, and I'm happy to say it was a purchase and not a license, an e-book from a notable online retailer. A good example of e-commerce and maybe many of you have engaged in that practice.

Actually through the use of my university procurement card within a matter of minutes I could transact over the Internet the payment of that purchase which, again, with the benefit of e-commerce didn't include shipping and handling fees. Within a matter of seconds that e-book was accessible for download to me.

Now, I would hope that e-book that I purchased would have the same equivalent rights to a hardcopy book I might purchase from that same seller, and that I would be able to hand that e-book down to my successor as Director of Policy and Planning, or to donate it to the library when I no longer needed, it so that it could in turn be available for circulation.

I think as some of the comments suggest, perhaps that may be permissible under current law, although I think as we look into the future, and as my later comments will suggest, the advent of other kinds of restrictions such as licenses and anti-circumvention measures might make that impossible into the future.

Second illustration that I actually raised before, some members of this panel when I spoke with you previously about anti-circumvention issues is the notion of the library's role in preserving and archiving information.

When I came to the university in the early 1990s there was an unfortunate recession that the state was experiencing and budget impacts were being felt throughout the university including the libraries.

One of the impacts on those budget restraints was the discontinuation of some journal subscriptions. Unfortunately that directly affected me because one of my most widely used journals, The Journal of College and University Law, was discontinued. The subscription was discontinued due to budget restraints.

On the other hand, the back issues were still available to me and I use those back issues on a regular basis because since it was in print form, the libraries were able to preserve and archive and circulate that information as appropriate.

Again, the concern is that there may be a potential as we encourage faculty to use technology and the demands for access to information in digital form, that there be a difference in treatment between print materials and digital materials does not seem to be in the best interest of the public and certainly not in the best interest of our students and faculty.

A third and final example, and maybe a foresight of an issue for you to think about into the future, is some discussion in the comments, as well as some discussions in other context including the recent Federal Trade Commission's discussion about the application to warranties to high-tech products.

One of the discussions that comes up consistently very applicable to first sale is the distinction between things that are in some kind of tangible or physical form versus things that are not.

I think it's a little ironic that when we think about the premise of copyright law that protects goods, original expression of ideas, I should say, that are expressed and fixed in a tangible medium, that on the other hand arguments are being advanced in the FTC context that federal consumer laws shouldn't apply because the good isn't tangible or physical.

Primarily in the case of computer software or increasingly first sale might not be applicable because there's not a physical or tangible copy that you can actually hand off, share, distribute, or sell to somebody else. Three examples with the last being more of an issue that I think is only recently coming under discussion.

The second and final kind of major thing that I'll end with is a comment about the trend towards the displacement of provisions of the uniform federal law, the U.S. Copyright Act, with licenses or contracts for digital information is of great concern.

As many of you know, Jim and I being from the state of Maryland are among the only state in the United States to have enacted the UCITA law. I've been very involved in those debates and deliberations.

College and university administrators, faculty, and students who previously turned to a single source of law and experience for determining legal and acceptable use must now evaluate and interpret thousands of licenses.

Those thousands of licenses often will limit, if not eliminate, the availability of fundamental copyright provisions such as fair use, the ability for libraries to archive to preserve information, or even the availability of first sale by characterizing those information transactions as a license rather than a sale.

It's misleading to contend that the bargaining power, especially when it's nonprofit educational institutions, were usually presented with standard license agreements developed by the information providers that it is about freedom of contract.

The enforceability of shrink-wrap and click-thru licenses also poses the same restrictive use regime on individual students and faculty researchers such as individuals like myself who might be purchasing e-books or transacting for information on line.

In conclusion, the digital age necessitates that we enforce existing copyright laws and at the same time rely upon ethical principles, educational measures to protect the rights of authors and creators of digital works.

The introduction of legal and technological measures that in turn diminish, if not eliminate, otherwise lawful uses I would contend is not in the public interest. Thank you.

MS. PETERS: Thank you.

MR. ADLER: Thank you. My name is Allan Adler. I'm testifying today on behalf of the Association of American Publishers.

As I stated in the one-page summary I submitted, we filed as part of a joint set of written comments and joint reply comments of the copyright industries. Since our counsel who prepared those, Steven Metalitz, who is going to be on a panel later this afternoon, I'm not going to address the issues that are dealt with in those comments.

I do want to address an issue that was raised in the notice of this hearing which talked explicitly about the impact that an amendment to Section 109 such as proposed by Congressman Boucher would have on the activities of libraries. Particularly the ones that were specified as interlibrary loan, uses of materials outside the physical confines of a library, donations and such.

From the perspective of the publishing community, our overall concern is that such an amendment to Section 109 would radically transform the traditional roles of libraries and archives in our society and do so in a way that was never contemplated by Congress when special privileges were afforded to these entities in the 1976 Copyright Act Amendments.

More importantly, I think it would transform the roles of these entities at the expense of authors and publishers who are trying to utilize precisely the same digital network capabilities that are coveted by the library community, but are seeking to do so to legally exploit the rights that they hold under copyright through the introduction of new formats and new business models for making literary works available in a competitive global marketplace.

Because of its potentially crippling impact on the commercial market for things like e-books or print-on-demand services among others, AAP believes that the implications of such a proposed amendment must be determined in the context of the library communities' espoused positions regarding certain other issues.

As you know, in the library communities' comments they have asked that this proceeding be used as a "platform," as one other commentor put it, to address a whole laundry list of issues including things like pricing, contract terms, technological measures, archiving, preservation, the use of passwords, some replay of the discussions of the 1201 rulemaking proceeding, as well as the debate over the DMCA's enactment itself.

Their suggestions about the illegitimacy of uses being made of technological protection measures, of circumvention prohibitions in the law, of contractual licensing, and even of the DMCA's copyright management information provisions, should make us pause, as we examine what the libraries are asking this report to recommend, and ask three very important questions.

What do libraries and archives really want to be able to do with digital interactive network capabilities? And if they are permitted to do what they want to do, would they still be libraries and archives as these entities were understood by Congress at the time the statutory privileges were created in 1976? Indeed, what do we understand libraries and archives to be today when anyone can establish a website, and call themselves a library or an archive.

And since the Copyright Act contains no definition of those terms and refers to them, at least explicitly with respect to libraries, both potentially as nonprofit and for-profit situations, what would it mean to take the privileges that were granted in 1976, update them as the library community requests for the digital age, and then allow these institutions to do all the various activities that they claim would then be perfectly permissible in a digital environment.

It's particularly disturbing that the library community comes before this body and acknowledges the validity of the use of technical measures when appealing for an amendment to the Copyright Act to promote digital distance education.

But then they turn around and denounce the use of the very type of access control that was discussed as being reasonable for that purpose, the use of passwords by students to access material that is used in distance education courses.

We also see certain self-contradictory arguments being made. They talk about concerns with respect to copyright management information regarding privacy interests of library patrons and users.

Yet, when you look at the recommendation that they make in support of Mr. Boucher's approach to amending the first-sale doctrine, which would depend upon some notion of the practical enforceability of a simultaneous deletion concept which would be extremely intrusive in terms of personal privacy if anyone was to attempt to try to see if, in fact, it worked on a practical basis, you are left to try to figure out how to deal with privacy issues which were not even the subject of the study as the Congress set it forth in the requirements of the DMCA.

We've heard certain dark threats about civil, even criminal liability, for libraries and their patrons despite the fact that the Copyright Act is riddled with special considerations exempting libraries and these other institutions from this type of liability or making special treatment of these institutions with respect to such liability.

While they do admit to some extent that we are at the embryonic stage of many of these issues and there is an uncertainty or lack of clarity regarding the exact nature and extent of the detrimental effects that they cite, they are still pushing for legislative action on the broadest possible scale just 24 months after the enactment of the Digital Millennium Copyright Act.

Talking about things like "chained" books are clever sound bytes and I'm sure they'll get a lot of attention that way. But this is hardly a documented problem of the type or scope that suggests a need for legislative action.

Certainly problems that arise with particular types of copyrighted works cannot, without evidence, be imputed to all works. For example, journal subscriptions with all other types of copyrighted works because each of them has their own particular set of circumstances determined by their particular business model and the way in which they are treated under the Copyright Act.

Sometimes you'll hear the libraries talk about what has "historically been within the discretion of libraries" when they talk about what they need for amendment under the first-sale doctrine.

Then you'll also hear them beg the question when they claim that certain aspects of the first-sale doctrine are really just matters that "result from publishing history" rather than specific deliberate statements of doctrine by Congress.

In the notice of the hearing, testimony was sought about the impact that a proposed amendment to Section 109, along the lines the library suggests, would have on certain library activities like inter-library loans.

Even if we set aside the context of digital transmissions and the digital environment, inter-library loan is an often misunderstood concept and one that needs to be reexamined just so we all understand what Congress attempted to do in 1976 and how it has been applied in the years since then.

Even the CONTU report, which was involved in helping to flesh out the meaning of the inter-library loan provisions, basically noted that "inter-library loan" is kind of a misnomer when it repeatedly referred to the concept of inter-library loans "or the use of photocopies in lieu of loans."

That is because interlibrary loan has come to mean something beyond just simply taking the physical copy of a work and lending it to another institution. It has really become a business of photocopying, making copies of works themselves.

In fact, it has become in certain instances somewhat indistinguishable from document delivery services offered by certain institutions on a for-profit basis.

Section 108 in general is very complicated and was drafted in very complex fashion because Congress didn't want to say that there was a general privelege of inter-library loan for all materials in a collection of a library or archive under every set of circumstances.

It divided the various provisions of Section 108 in order to be able to address certain privileges that a library could have with respect to making copies for itself for its own use, as opposed to the situations in which a library could be permitted to make copies of works for its patrons and users. Those very careful distinctions, unfortunately, are not preserved in the way you hear about the need to amend the Copyright Act in order to facilitate services like inter-library loans in the digital environment.

We talk about preservation and the need for security under Section 108. Section 108, in fact, only deals with the issue of preservation as it applies to unpublished works that are currently in a library's possession. It doesn't deal with all manner of copyrighted works across the board. It's important to examine those issues much more closely than they have been discussed thus far.

Similarly, when we talk about the receipt and use of materials donated to libraries, again this is really a licensing issue. It's not a first-sale issue as such, but examine what the law already says with respect to the donation of materials with respect to licensing.

In Section 108(f)(4) it specifically says that despite the privileges otherwise provided to libraries and archives under this section, nothing in the section is to effect any contractual obligations assumed at anytime by the library or archives when it obtained a copy of a work in its collections.

Clearly the Congress did not intend that copyright was going to trump contractual licensing across the board in every situation. Quite the contrary. It managed to write these privileges for libraries and to do so with account of the fact that contractual licensing was going to be the primary way in which copyright owners were, in fact, going to be able to legally exploit the rights provided to them under the law.

Let me make one last point in the time I have about the impact of the proposals made by the library community regarding some of the new business models, new products and services that are coming on line from book publishers.

For that purpose, I would request that two articles from the New York Times be entered into the record of the hearing. Both of them were downloaded from the New York Times service which I subscribe to. I get it for free because they don't charge a fee.

In this case, they make it known to subscribers that they welcome you to print and download copies because they have a special option for printing the article to make it easier to print and copy.

The two articles that I want to introduce into the record deal with the current marketplace developments with respect to e-book services and the competition in the development of those services, as well as new library-like services that are being offered in competition by groups like NetLibrary, E-Brary, and Questia.

This is precisely the type of beneficial development in the marketplace of competitive new business models with new capabilities and new benefits for the users of copyrighted works that are disseminated through these services that we believe would be thwarted if the types of proposed amendments to Section 109 and the Copyright Act in general recommended by the library community are adopted. Thank you.

MS. PETERS: Thank you.

MR. ATTAWAY: My name is Fritz Attaway. I am Executive Vice President and Washington General Counsel of the Motion Picture Association of America.

I thank you very much for this opportunity to appear here this morning.

I would like to start out by pointing out that this very nice room, and the televisions and the carpet and everything else in this room have been paid for by the copyright community, primarily by the people that I represent. It is deducted from our compulsory license royalty fees every year. Sometimes I think we've paid for it over and over and over again. Anyway, it's a very nice room.

MS. PETERS: You only paid for the furniture once.

MR. ATTAWAY: You have a very long day before you and I'm going to be very brief. I would like to associate my comments with those of Mr. Adler and Mr. Sorkin and Mr. Metalitz who will come later.

I would just like to make one very simple point, and that is that there's nothing in the record of this proceeding that supports amendment to Section 109 of the Copyright Act, which I'll refer to as the first-sale doctrine.

The record of this proceeding can support only one conclusion: that the DMCA and the development of electronic commerce has had no effect on the operation of the first-sale doctrine, and the relationship between existing technology and the emergence of new technology, and the operation of the first-sale doctrine, is in perfect harmony.

The record does include some speculation that this harmony may not exist forever. Indeed, that may or may not be the case. If problems develop, perhaps we should revisit this issue. However, Section 104 of the DMCA does not direct the register and the Assistant Secretary to engage in speculation.

It directs them to evaluate and report on the effects of the DMCA on the operation of the first-sale doctrine and the relationship between emerging technology and the for-sale doctrine.

The record of this proceeding does not support any finding that the DMCA has affected in any negative way the operation of the first-sale doctrine, or that technological developments require changes to the first-sale doctrine. The first-sale doctrine is operating as intended.

Now, some parties contend that the first-sale doctrine should be radically changed into something that it was never intended to be. They would transform the first-sale doctrine from a narrow limitation on the distribution right, as the Register pointed out in her opening remarks, into a broad contraction of all exclusive rights, including the reproduction right.

In addition, they argue that the first-sale doctrine should be amended to restrict the ability of copyright owners to enter into contracts that these parties find objectionable. That was never the intent of the first-sale doctrine.

The first-sale doctrine was not intended to limit the reproduction right or the right to enter into contracts. Section 104 of the DMCA was not enacted to address these issues.

Section 104 was enacted to address concerns that the first-sale doctrine operate in the digital world as it was intended to operate in the analog world. The record of this proceeding demonstrates that the first-sale doctrine is operating as intended in both worlds.

That finding should be the essence of your report to the Congress. In listening to the testimony of Mr. Neal and Mr. Petersen, I heard Mr. Neal say that the public is losing, but I didn't hear any support for that assertion. I heard Mr. Petersen provide hypotheticals using the words "might" and "could."

I submit to you that your job is not to

speculate about what might be or what could be, but what is, and what is is a copyright law, and particularly Section 109, the first-sale doctrine that is operating as intended and it should be allowed to continue to operate as intended until there is some real evidence that something is amiss. Thank you very much.

MS. PETERS: Thank you.

MR. SORKIN: Thank you. My name is Bernard R. Sorkin and I speak for Time Warner. Fortunately for your schedule and your patience, Mr. Adler and Mr. Attaway have left me with very little to say.

I would like to start, however, by thanking Secretary Rohde for his statement about the necessity for copyright protection for works. Having said that, I can't let the praise go unalloyed.

I would like to differ with a matter of emphasis. That is, I understood you to say, Mr. Secretary, that the development of the printing press was something like what's happening today with digital development.

The development of Herr Gutenberg's machine was, indeed, a bombshell. What we have today, however, is a nuclear bomb, if not worse, by virtue of the ability to reproduce quickly and at negligible expense copies without end and copies from copies without any degradation of quality; the ability to distribute those copies throughout the world with a click of a mouse and the ability to modify the works with clicks of a mouse.

These things are not just like a printing press. They place great dangers on content owners,and great dangers on the development of the Internet because if content owners, for whatever reason, feel the danger is sufficient so that they will not make their works available in digital form or on the Internet, there will be no need for the development of an infrastructure and the public thereby will suffer.

I would like to pick up a little on what the Register said about what the first-sale doctrine is and what it provides. Right now I think it's common ground by virtue of the definition. That is to say, it starts with the phrase, "Notwithstanding anything in 106(3) certain limits are placed." It doesn't say "notwithstanding anything in 106."

As Mr. Attaway pointed out, the kind of request that's being made is not merely for modification. It's what I called in my paper transmogrification which is a transmutation of a grotesque kind.

If that happens, we have to consider what I expect the unintended consequences will be. I hope I'm not being too charitable in talking about unintended consequences.

Consider what happens when somebody who owns a digital work allows it to be downloaded and, by virtue of the suggested change in the first-sale doctrine by virtue of ownership of that digital work is able to transmit that work to somebody else.

The transmitter still retains the original work. The somebody else has a work which he or she can now transmit. Either of them can transmit it not only to somebody else but to many, many somebody elses. Each one has immediately become a publisher of whatever that work is on a worldwide basis.

Whether that consequence is intended or unintended, I'm not sure. I think our friends in the Library Associations and the other proponents of this kind of change can answer to that, but it certainly is a consequence.

That is precisely the reason for the urgent need to oppose any such change because what it does is destroy the need for an infrastructure and the need for an Internet. As a result, we will have, in the phrase that seems to have lost some currency, an information superhighway with no cars on it because content owners simply will not be able to provide materials subject to this kind of danger.

I underline both in terms of what I heard this morning and in terms of the papers I had seen earlier on that there has been nothing, as Mr. Attaway suggested, other than sheer speculation without any foundation as to how librarians and educators might be inconvenienced but not inhibited in anyway at all by the current operation of the first-sale doctrine or the current operation of any copyright law.

Steps have been taken over the years, and both Mr. Adler and Mr. Attaway refer to them, to provide privileges to educators and librarians to fulfill their needs. Not always their desires perhaps but their needs.

As many of us here know, several years of hard work and maybe even blood, sweat, and tears, were invested in developing guidelines for multimedia production for educational purposes; guidelines which I understand are working successfully.

What we have is a situation where I think the decision that should come out of this office at the end of these hearings is that no change should be made in the first-sale doctrine.

To have further studies is just fine. Content owners are prepared to address the needs of users. Content owners are not in the business of not making their works available to the public.

That ain't no way to make a living. Content owners, in the nature of their business, make their works available as widely as possible, but the works have to be made available subject to adequate and effective -- I didn't make up those words -- adequate and effective protections. Thank you.

MS. PETERS: Thank you. We are going to start the questioning. Obviously there's disagreement among the various members of the panel. What I hope with the questions that come forward is that there can be some dialogue, that it's not just a one-way question.

I'll start but I may come in later. Let me throw in a question that actually Mr. Adler raised with respect to a proposal of the Library Associations. If the proposal that was in the Boucher bill and that you basically put forward again is that with regard to digital material and, in some cases, people have said digital downloads, that there should be the equivalent of first sale by the simultaneous destruction.

Obviously there are practical and evidentiary problems with that. Mr. Adler raised the question about how do you really enforce such a thing and how does that not get in the way of what your stated views are with regard to privacy concerns.

Could you just kind of address how you can put in place an effective simultaneous destruction provision that doesn't run afoul of other laws or other problems?

MR. PETERSEN: A couple things come to mind to me in terms of your specific question. One is that the notion that this is somehow extremely different and radical from the current process I think we should rethink.

I understand the convenience of digital technologies for making copies and transmitting, but I think you might ask the same question if I were to want to give, and this is maybe a little too hefty of a book, but a shorter book to Jim or to the libraries and I decided before I did that I was going to photocopy my own copy to keep, it raises some of the same kind of evidentiary privacy issues in terms of how are you going to know that I actually made a copy illegally before I passed it on to somebody else or didn't destroy it.

In the case of the digital transmission, destroy the electronic version of it. Even though it's not as likely that somebody would photocopy it before they give a book away, I think perhaps some of the same issues might be raised.

I think the other thing that I want to raise in that context is that the concerns about piracy or about infringement, whether it's libraries or individual users might engage in, I would argue it's equally speculative or predictive of the future as our comments about the impact of some of these laws.

Even though I don't want to get in a tic for tac comments here, I think I can point to several places in the comments where the words "could, might, should" were introduced as to why somebody might not destroy that digital copy.

In fact, the comments of Time Warner say transmission of the work would require reproducing it and could lead to distribution of the work to multitudes of recipients. I think there is the same speculation that works the other way, that individuals or libraries and others are going to distribute it in ways illegally and it raises some of the same problems.

MS. PETERS: Okay. Can I just follow one little piece up with what you just said?

MR. PETERSEN: Yes.

MS. PETERS: One of the things that first-sale doctrine did was basically say, and I think it was Mr. Sorkin pointed it out, is that it focuses on that it's an exception to Section 106(3). Under your proposal you are really mandating the right to reproduce the work.

In your scenario where you say it's totally the same, it sort of isn't. If you gave that book away, the first-sale doctrine that allows you to give it away, you make a photocopy separate and apart from it. It's not protected by the first-sale doctrine.

It's protected, if at all, and there is a very strong question about that because you've copied the whole book, under fair use. I think that isn't just a philosophical question. It's a basic principle that the distribution right really doesn't involve the reproduction right. Going down that path is a very different path to go.

Okay. Can I ask one other question? You talked about the fact that you just bought a new book.

MR. PETERSEN: Right.

MS. PETERS: Your question came about -- you're talking about a library and its ability to lend that book, to archive that book or, if you didn't buy it for the library, your ability to donate it.

Under the terms and conditions that you bought that book, what are the problems with having a library lend it, the ability to archive it? Did it come with terms and conditions?

MR. PETERSEN: It did not. In fact, the one that I recently purchased and, of course, the average consumer is not going to pay attention to this, but I looked closely and it contained a copyright notice but not anything that prevented me from giving it or sharing it or the implications of first-sale by essence of the copyright notice. It could just as easily come with terms and conditions or a license arrangement that would have restricted that.

MS. PETERS: But that one didn't?

MR. PETERSEN: It did not.

MS. PETERS: Have you had experience with purchasing things, not online access?

MR. PETERSEN: Can I just add one further thing which is, again, the perspective I bring, I think, in terms of trying to encourage the use of digital materials. If it had come with a license agreement, I can tell you that I would not have licensed it.

I would have chosen not to, especially if there was a hardcopy or print version that I could have purchased because of some of these very concerns we've talked about here.

MS. PETERS: So had you been given a license --

MR. PETERSEN: Right.

MS. PETERS: Book license, yes or no, you would have looked at it and said this restricts me in ways that my purchasing of the book does not. Therefore, because I'm in a library setting, my choice is to go with the print edition.

MR. PETERSEN: That's right.

MS. PETERS: Okay.

MR. PETERSEN: And I would have made that decision based on some of the very controversies we're talking about here today. I think it's an unfortunate decision given the potential of technology, particularly for teaching and learning and use of digital works, but I might have made that choice.

I guess it goes to the point of the disincentive for authors and creators to develop digital works which I emphasize with. I mean, faculty and universities are creating intellectual property that we want to digitize as well.

The disincentive also comes on the other side where you're a potential user or purchaser or licensee of digital works as well.

MR. NEAL: Marybeth, let me just add, I think you will hear later today through other testimony about technologies that are being put in place that allow e-loan, e-transfer, e-giving away of materials with the ability to simultaneously destruct other copies without violations of privacy. I do not know those technologies but I know there are other testimonies that will be given today that will speak to those issues.

MR. ADLER: May I just comment?

MS. PETERS: Sure. Absolutely.

MR. ADLER: Mr. Petersen seems to have just presented the paradigm of exactly what the publishing industry is talking about when it talks about competitive choice for consumers and the type of concern that we have that the amendments recommended by the library community would eventually thwart the effort to create as many consumer choices as possible in the marketplace.

For precisely the reason that he

stated, he would have rejected purchasing that subscription from that particular publisher or that particular distributor because he didn't like the licensing terms. That's exactly the reason why another competing distributor or publisher would probably offer different terms with respect to the same types of materials.

One of the things that we are so concerned about here is having the Government by statutory fiat essentially eliminate the ability of competitors in the global marketplace to establish different models that give consumers choice.

What essentially is being asked for here in terms of the proponents of amendments to 109 is a "one size fits all" that's going to prevent these types of different competitive services from being offered on different business models.

The example that Mr. Petersen gave has relevance, for example, if you read about GemStar, which is an e-book distributor that has purchased the Rocket e-book and Softbook versions of e-book, both of which they are looking at a business model involving a closed system.

They believe that this is going to appeal to publishers because they could avoid the necessity of downloading the books off the Internet. They don't view that as a safe conduit.

They think that publishers would be more encouraged to license works to them for use in their e-book devices because it would avoid the risk of piracy in the process. They think that their e-book devices are going to have appeal to consumers on that basis because more publishers will make more works available to consumers in that format.

Whereas Microsoft, for example, and other companies are looking to shape their e-book offerings with the ability specifically to download text off the Internet, or to be able to take the text from your personal computer, because they believe that's going to offer more convenience and other advantages in the way they can present their product to consumers. Two entirely different business models.

The question that arises is why should the Government step in and impose a statutory strait jacket that's going to say there's only going to be one business model because the digital first-sale doctrine is going to mandate how and when and under what circumstances and terms a copy of this work can be transmitted to another person.

MS. PETERS: Do you --

MR. NEAL: I just want to confirm that overwhelmingly libraries operate in a sole-source, sole-provider environment. The issue of choice is not a realistic option for us for the overwhelming majority of information that we acquire for our users.

Secondly, I think we need to be very cautious as we move down this path, a real slippery slope of aggravating a seriously developing digital problem, and that is creating a situation where the ability to pay, the ability to negotiate effectively, to have the expertise to negotiate effectively, is going to determine the level and quality of information that you can provide.

Libraries in society help break down those barriers. They represent agents of the public to enable effective access and cost effective access to information. I think we need to be careful there.

MS. PETERS: I only have one other question. What is sole source when you say sole source?

MR. NEAL: One place that I can acquire a body of information.

MR. ADLER: Could you explain that further? What does that mean?

MR. NEAL: The publisher publishes a book.

I can buy that book from that publisher.

MS. PETERS: However --

MR. NEAL: The publisher publishes a journal. I can buy that journal from that publisher. If I choose not to buy it from that publisher, I don't have another place to go to buy that journal.

MR. ADLER: Although you have competing journals.

MR. NEAL: But I don't have another place to buy that journal.

MR. ADLER: But that's provided for in the essence of copyright itself.

MS. PETERS: The exclusive right.

With respect to the proposals that libraries made, do you make a distinction between what is in essence the equivalent of a distribution of a physical copy? You order it like your e-book.

You order it, it's transmitted, you get it on your hard drive, versus your -- I won't say the word contract -- to get electronic access to a work so that you are really not contracting to get the equivalent of a copy. Rather, it's the online access.

Do you make distinctions? Do you basically say that your recommendations with regard to first sale really only apply when, in fact, you are trying to get the equivalent of a book but not certainly with regard to electronic access?

MR. NEAL: As we build our electronic access in our libraries, the predominate model that is in place today is the licensing of access to information. Historically we've had the ability to acquire and load locally content and, therefore, have the ability to own it and manage it at the local level.

Increasingly, that is not the case in most library settings. Therefore, we attempt to negotiate in the contract process a role and responsibility for the library or some other participant in the long-term availability and archiving of that information when the license no longer is in place or has been set aside or we no longer acquire access to that information.

That is a process which I think is in development. I don't think that we have good and effective ground rules in place or standard or model contract language that helps us bridge the differences between acquisition and licensing.

MS. PETERS: But you're not in anyway suggesting that if you have merely a contract for electronic access that the concept of first sale should apply to that material?

MR. NEAL: No. But what I'm saying to you is that we are in an environment where the predominate means of access that libraries are currently employing is to, in fact, license information. We need to be sure that as that legal contractual framework comes to dominate we not lose the ability, lose the application of the exceptions of limitations that exist within the current law.

MR. ROHDE: Okay. Thank you. I want to begin by asking the question Mr. Attaway raised earlier to Mr. Petersen and Mr. Neal.

In your testimony you point out that -- you make the point that the state of law post-DMCA is actually in the perspective of your Episcopal Bishop taking libraries a step backwards or impeded. Your perspective of the first-sale doctrine.

Can you tell me specifically how that has happened? What I got from your testimony is that when Congress acted a couple of years ago that it actually harmed your ability to access information. Can you give me some specifics about that?

MR. PETERSEN: Well, the two specific areas that I would point to is, one, the inability to extend first sale to digital works would be the example.

Secondly, the effects of licensing and, in our state, the implementation of a law like UCITA where a license term, you know, with a shrink-wrap click-thru that apply to my e-book where there might not be a choice of another license. It's that license or no license where there might not be another publisher.

I think those two examples in the case of where the license term might prohibit any kind of first-sale rights are the examples I would allude to.

MR. NEAL: I agree with that point. We are fresh off of this UCITA experience so it colors dramatically the way we think because we see parallels as we work on licensing. In contracting language it blurs across into our interpretations and thinking about first sale.

I mean, Allan talked about the relationship between contract law and copyright law and the standard presentation of UCITA as it is -- the point from which we are negotiating UCITA talks about the complementary relationship between those two legal frameworks and the preemption provision and the public policy provision that exist in UCITA.

I think those are relevant to what we're talking about here today. My ability as a library on behalf of my users to secure and provide inter-library loan copies or inter-library loan delivery of works is something that is not clear in this environment.

My ability to manage my societal responsibility in terms of archiving and long-term access to information is not clear in this environment. The ability of friends that I have developed for my library over many, many years to give me works which they routinely do in the analog world. It's not clear how and whether they can continue to do that in the digital world.

MR. ROHDE: What you're saying is the harm you are experiencing is ambiguity?

MR. NEAL: I think the harm is ambiguity but I think there is a stifling impact as well in terms of how and if we will perform our responsibilities and roles.

MR. PETERSEN: If I can also add, and it goes back to your earlier question about not just first sale but the reproduction right issue, and I think Jim alluded to the fact but I think you'll hear more testimony later today.

I just want to say for the record that I think the position that will be later taken by the

Digital Future Coalition with respect to 106 reproduction right issues and the kind of limited language amendment, if you will, that will accommodate that in the context of digital first sale, I think, was certainly what we had in mind without ignoring reproduction issues all together but in a very limited language as such that I think you'll hear more about later today.

MR. ROHDE: I'd like to turn to Mr. Sorkin. In your testimony you point out that the underlying purpose of the first-sale doctrine is transfer of possession.

MR. SORKIN: A tangible good. The statute uses the word "copy" and "copies" are defined as "material objects."

MR. ROHDE: And you also point out that--I want to make sure I understand your testimony correctly--that the doctrine of first sale in your perspective not only applies in the "analog" or paper world, but you also say it applies to new media. Correct?

MR. SORKIN: To digitized media?

MR. ROHDE: Digitized media.

MR. SORKIN: It depends on what we're talking about, Mr. Secretary. It would apply to a CD which I can hold in my hand and give you, or a DVD if you wish. The danger to which we are directing ourselves in this testimony is to digitally transmitted and downloaded programming.

But the fact that something is in digital form, if it's a tangible copy, then the first-sale doctrine would apply.

MR. ROHDE: So it would apply if it's going to either a CD, a floppy disk, something you can hold in your hand?

MR. SORKIN: Yes.

MR. ROHDE: But it would not apply to something electronically transferred?

MR. SORKIN: It couldn't.

MR. ROHDE: Under current law?

MR. SORKIN: Under current law it couldn't and it shouldn't.

MR. ROHDE: In looking at Mr. Boucher's legislation and what Mr. Boucher proposed in amending Section 109. Is he saying that the first-sale doctrine could apply in this new environment provided that whoever is transferring the product, whether it be a book or a piece of music or a movie or whatever, then destroys the copy that he or she has -- I don't want to put words in your mouth but I assume that condition is not enforceable? Your problem with that is you don't believe that's an enforceable mechanism?

MR. SORKIN: I don't think the technology exists, to say nothing of the good will.

MR. ROHDE: His legislation is not based on technology. It says provided that the person has --

MR. SORKIN: Okay. Then let's talk about good will or enforcement in addition to the privacy aspects that Mr. Adler raised.

MR. ROHDE: One of the things in my job that I get exposed to, I get exposed to a lot of new technologies. I know that the technology currently exist where you can buy a product that--privacy technologies are being developed quite rapidly right now.

There are technologies that you can access now that will allow you to put into your e-mail system where you can send an e-mail to somebody and you can attach on there an encryption code that whenever you send it to cannot then later send it to somebody else to be opened.

There are a variety of means which you can protect information via e-mail. You can send an attachment and you can prevent it from being transferred to somebody else.

You can even put codes in there that once you transfer it -- once that person transfers it, then it simply disintegrates and cannot be opened by somebody else. If that technology exists in e-mail, it could potentially exist with respect to anything that is traded on the Internet.

Now, if indeed that is effective, maybe it's not there today, but if indeed it is effective and it comes about, in your judgement then is there no need to change the law and first sale then can apply to transmission of information over the Internet?

MR. SORKIN: About all I can say to you in that regard, Mr. Secretary, is that it sounds like something my company and perhaps the others, I can't speak for them, would be willing to consider.

We would have to be assured of its effectiveness on several levels both in terms of whether or not the giver, the transferrer retains a copy, whether or not the transferee can do something further with it and, if so, what and how. What you are describing is something that I think might be well worth thinking about and investigating.

MR. ROHDE: So, in other words, if the technology is available that would assure the destruction of a product once it's transferred, then your requirement that it must be a tangible item would no longer necessarily apply?

MR. SORKIN: Well, what is it that would be destroyed in that case?

MR. ROHDE: Whoever has the product on their computer and they are transferring it, once they transfer it if you can assure that it is automatically destroyed. It's not up to the discretion of the person who transferred it.

MR. SORKIN: I would have to ask you the second level question, so to speak, and that is to whom or to how many whoms can that transfer be made. We know that in the digital world, as I suggested in my small introduction, a digital transfer can be made worldwide.

MR. ROHDE: I would like Mr. Neal and Mr. Petersen the same question. If, indeed, that technology exist that could assure the destruction of a product once it is transferred, then does your need to have Section 109 changed and amended go away from what you're proposing? Would technology permission take care of this problem from your perspective?

MR. PETERSEN: Well, I would certainly say technology has the potential to resolve some of these issues as long as it doesn't, as I am afraid some of the DMCA provisions might to, interfere with some of the rights of the library as a user.

I think there could be some limited narrow applications that would actually facilitate the very amendment that we are proposing in terms of verifiability. Again, I think the privacy issue, though, is one that we have to be concerned about with any new introduction.

I've brought this up before as well, but using our UCITA experience, again the very notion of self-help, that was originally part of UCITA for giving content providers, information providers, the ability to remotely disable information was not adopted by our general assembly and ultimately taken out of the national UCITA bill because of privacy concerns.

I think we have to be aware of what the privacy implications might be as well.

MR. ROHDE: Sure.

MR. ADLER: I don't want to put words in the mouths of my friends in the library community, but taking note of the evolving way they have approached the issue of access controls from, at first, sort of endorsing the concept, for example, passwords in the context of distance education, to now very strongly criticizing the concept of access controls in the 1201 rulemaking proceeding, I suspect that sometime after this technology becomes available in the marketplace, we will once again be sitting before you.

They will be then objecting to it on fair use grounds, saying that the need to have to destroy their own copy in order to facilitate what would be considered a digital first-sale concept to transfer the copy to somebody else is going to burden their fair use rights, as they would put it, because they are no longer going to have their own copy to make fair use of.

MR. ROHDE: Just interesting speculation. I think that an issue as we look at the way libraries function under first sale is not only the issue of the ability to destruct, which I think is a relevant and important concept, but also perhaps the issue of disenable, because in some cases what first sale does is enable us to give or transfer temporarily if you look at issues of inter-library loan and issues of distance learning.

That is, I can move a work into another setting for temporary use and then it moves back. I think if there were comparable capabilities for purposes of disabling as well as destruction, then I think it would integrate well with the way libraries support their communities.

MR. ADLER: Although, I think, that again, I would argue, might be in conflict with the view I understand the library community takes with respect to the electronic self-help provisions of UCITA.

MR. NEAL: Sorry. I don't understand.

MR. ROHDE: I have one final question for Mr. Adler, Mr. Attaway, or Mr. Sorkin, whichever one of you want to respond.

Last Friday in the Washington Post there was a front page article. I don't know if you read it. I'm sure if you read it, it would be very disturbing to you about what's going on on college campuses in the current Napster world.

There were a number of college students who were interviewed for that article who were very, very cavalier and very blunt about how they are making use of this great new digital world and accessing information and copying music for themselves and all kinds of information and transferring it amongst themselves and just didn't give a rip about any kind of law that might be out there.

In fact, I remember a quote from the

article of one student saying, "You know, not only are the horses out of the barn here, but they are multiplying."

My question is I wonder are we in the right battlefield here? I mean, from your perspective of representing content producers, you're fighting to make sure that we can maintain the control.

Mr. Sorkin, you've said several times today, and it's in your testimony and even in your reply comments, that you fear that content owners are not even going to dare to put their information on networks because of what's going on.

Can we really stop this because of what's happening with technology and the very nature of it? I mean, are we really fighting the right battle to protect the interest you're trying to protect by debating these issues dealing with copyright ownership when we could have whatever laws we want enacted and it might be totally circumvented because of the ability that people have with working with networks and digital technology.

MR. ATTAWAY: In response to that question, my question back to you, Mr. Secretary, is what is the alternative if we don't stop it? The people I represent invest on average $80 million per motion picture. Now, explain to me the financial basis for that business if those movies cannot be protected.

MR. ROHDE: My question is how do you stop it?

MR. ATTAWAY: You stop it by sound copyright laws and the employment of technological self-help like we have tried to do with the DVD, with I must admit has mixed success. But the fact is that DVDs are out there in the marketplace and people are enjoying a movie viewing experience that they didn't have before because modestly successful technological means were used to prevent wholesale copying.

This is the type of thing that we have to do. Otherwise, we're out of business and I don't think that's an alternative that anyone wants to contemplate.

MR. ADLER: While I would agree with what Fritz said, the answer to your question is yes, we try to stop it. Understand, however, that we're not talking about absolutely eliminating it.

We're talking about something that has existed with respect to copyright for years which is the notion that, in different industries, depending upon the nature of the business model that creates the copyrighted work, there are different levels of acceptable leakage.

We recognize, for example, that under the fair use doctrine there's a lot of copying that goes on that couldn't pass any real test of fair use. The question of whether or not you act upon that through litigation or through any other way is a business judgment that is often made in terms of whether it would be cost effective, whether or not you are really suffering any harm.

What we are really asking for here is not to be able to stop absolutely that type of conduct. We are asking to be able to have an environment that allows us to reshape business models to develop them in a way that takes these new capabilities and new attitudes even of, say, the students with respect to copyrighted works and takes them into account in the way in which people understand what is involved in trying to recoup our investment and some kind of profit in the business of creating and distributing copyrighted works.

The problem is, if Congress steps in right now, barely two years after the DMCA was enacted, very carefully selecting and choosing how the digital world would be accommodated in the Copyright Act through specific statutory changes, and if we come in now and again do the kind of broad scale changes that are being sought by the library communities, none of these industries will have the time to adapt their marketplace practices to be able to deal with the potential flood of copyright leakage. Not the type of acceptable leakage that goes on in the print environment and in the analog environment.

There are always people who will copy books. There are always people who will copy music and will copy movies. But now they'll have the ability to do so on a mass scale that is more destructive of the commercial rights that copyright gives to authors.

MR. NEAL: I was going to say another strategy available to us is for Congress through public policy to embrace libraries as collaborators in this process. We're not pirates. We're responsible societal agents who acquire information on behalf of our communities, educate our communities in the responsible use of that information, and bend over backwards to follow practices that have been agreed to.

I think there is a collaboration here that can be supported by public policy. I think we see ourselves as very responsible, very responsive, and not pirates in this environment. We've always played that role in society and we will continue to do that.

MR. ROHDE: Thank you.

MR. SORKIN: May I add a footnote to all this which is that I agree with all of them and I agree with you, but we need all of these efforts. We need very effective protective laws which this exercise here seems to be directed to tearing down. We need effective technologies.

We also need desperately education. If I were to take the wallet out of your pocket, surreptitiously of course, I think you would lose some of the respect you might have gained as a result of my testimony today. But you might not think any the less of me if I told you I was copying CDs at home to make cassettes for my car.

We haven't engendered in our children adolescence and adults the kind of respect for intangible property that we have engendered to a large extent for tangible goods. That's part of what we have to do.

Insofar as business models are concerned, we are all trying that. The book that Mr. Petersen brought with him, The Digital Dilemma, spends a lot of time on that subject. They may or may not work. Technology may or may not work but, as Mr. Attaway says, we are all putting fingers in the holes in the dike to try and stem what is a very destructive tide.

MR. NEAL: Can I make one more comment? It's a little flip and I apologize for it. The wallet that you just took out of your pocket, there are societal agreements that say there are agencies that can go in and take that wallet and take money out of it for societal public goods. It's called Government taxes.

I think in the same way we built the copyright law in a way that says there are societal benefits to extending to the education and library communities certain exceptions or limitations because they benefit the country, the economy, and societal goods. I think we need to look at these things in a balanced way.

MS. PETERS: David.

MR. CARSON: I'd like to follow up on the first question Secretary Rohde asked you, Mr. Sorkin. This question isn't directed necessarily to you but any of the three gentlemen on that side.

As I understood Secretary Rohde's question, it was essentially there are technologies out there which purport to be able to make it so that when you do retransmit something you have received to someone else, at the same time the copy is destroyed.

Whether they really do or don't do that may be a matter of debate. I think I heard some real concern on your part that they don't really effectively do that. I've also heard that we may hear some testimony later today that they really do do that.

Let's put that aside for a moment. Let's put aside for the moment the concern I heard from you, Mr. Sorkin, that perhaps when I retransmit it I can retransmit it to 500 people in one click of the mouse and then my copy is destroyed.

Let's take a hypothetical and let's assume that the technology did exist that could reliably restrict you when you are trying to retransmit the copy you've received. You can transmit it to only one person and at the instance that happens, you have no control over this. The copy on your computer disappears.

I think, and correct me if I'm wrong, that would be the digital equivalent of the analog first-sale doctrine that we have right now. If you could be assured that technology existed, would you have any objection to the Boucher proposal to amend Section 109?

MR. SORKIN: I might. I hate to be a quibbler about this. The quality of a transfer of a CD or DVD from me to you, Mr. Carson, is different from the quality of a transfer via digital downloading from me to you of the same copyrighted work. Different in terms of speed and in terms of convenience.

I am not likely to put it into Federal Express to send it to you in Washington or California from my home in New York. That wouldn't be a consideration at all if I'm doing it by digital transmission.

That could create, and I underline could because, frankly, I haven't talked about it with technological experts, but I have a sense that doing it by digital transmission because of convenience, because of distance, because of repetivity and so forth, would create problems for us that would not be created in the old days.

MR. CARSON: Anyone else want to --

MR. ADLER: Yes. David, I think that the

testimony and comments of the library communique indicate quite clearly that that would only shift the argument to the question of whether or not the digital first-sale doctrine trumps any kind of contractual licensing arrangement that may be involved with respect to the work.

Again, I think it can't be emphasize too strongly that although you are becoming inured to hearing about contractual licensing in negative terms. At least in the way in which the library and educational community refer to it.

Contractual licensing is one of the ways in which information is now being used in the context of new digital capabilities to provide it where it has never been able to be provided affordably or conveniently before. Also to maximize the uses you can make of it.

For example, if you're talking about, again, looking at the models of the different people offering e-book services or the people who are offering digital archive services like Questia and E-Brary and NetLibrary, one of the things that you're talking about that you have to recognize is that e-text is not the equivalent of a book.

What you are able to do through these

services is to have online search capabilities. You're able to have online annotation capabilities. You're able to make richer uses of the product because of the capabilities that arise when the product is in a digital format rather than a print format.

That is part of what is involved in determining the terms from pricing down to the terms of use under which that product or service is offered to the users.

There is a bargain involved there and that is why I emphasize the importance of giving these industries the time and ability to develop business models that match the new challenges presented to them and new opportunities by the digital network technology.

MR. ATTAWAY: Very quickly, I don't understand -- I understood your question up to the point where you asked then would we support amendment of the law along the lines that Congressman Boucher has suggested. I don't see why that's necessary.

To change your hypothetical just a little bit, if I purchase online a work that is delivered online into my computer and it resides in my hard drive and I decide to give or sell my computer to my nextdoor neighbor, I don't think anyone would argue that is a violation of the law.

With respect to that work, the copy that I downloaded that resides in my computer has been transferred. Under the first-sale doctrine there's no problem. If technology permits the functional equivalent of that transfer from me to my neighbor, I don't know that anyone would argue that there is a problem and why do you have to change the law.

The present law is working and will work in the digital environment as well as it has worked in the analogy environment, I believe.

MR. CARSON: Well, then let's take the hypothetical that you have this technology and no matter what the recipient of this digital copy does he cannot control the fact that once he transmit it to one person, it's gone. He doesn't have it anymore. Under those circumstances, are you saying that the current Section 109 would permit him to do that?

MR. ATTAWAY: I said if there is a functional equivalent. I don't know how to do this technologically. Maybe it can't be done right now. If there is a functional equivalent of taking my hard drive where this copy resides and transferring it to my neighbor electronically where I don't physically take the hard drive, I don't see a problem there.

MR. CARSON: Mr. Adler and Mr. Sorkin agree that Section 109 would accommodate that as it is currently drafted?

MR. SORKIN: No. I do not. It always humbles me to disagree with either Mr. Adler or Mr. Attaway. I'm humble and uncomfortable. What I tried to suggest--see, Mr. Attaway's first example was, you pick up your computer and you take it to your nextdoor neighbor. I have no problem with that. That is the functional equivalent of transferring a tangible copy.

On the other hand, I think the question that Mr. Carson wound up with was you transmit it to your neighbor and your copy is destroyed. It's not enough to destroy that copy for the reasons I outlined, although parenthetically I said it's worth considering.

For the reasons that I outlined, the transmission digitally of the copy is of a different quality than picking up the machine and taking it nextdoor. A different quality by virtue of speed, of potential distance, that sort of thing.

I'm concerned about that because what that means is that when it's transferred to you, you could transfer it to the Register and suddenly everybody has seen that movie and nobody has gone to a theater.

MR. ROHDE: I'd like to follow up on that. You point out that it's because of the nature of computing networks and you have the ability to transmit that information not just to one person but to many more people.

One of the other things about the new era that we live in is you now have documentation when people communicate with each other. You can't go buy equipment off the shelf to record movies in your basement and go around and hand it off to people and exchange it for cash. That's a violation of the copyrights of MPA's members to do that.

It's actually difficult to enforce, if not impossible to enforce, if there's no paper trail. What we have now in this era of e-mails and the Internet, you now have an ability to trace this. Doesn't that add a level of enforceability to this even though --

MR. ADLER: You'll hear the privacy arguments about that immediately. Privacy advocates will come in and talk about all the ways in which that capability is going to be abused and misused. They may be right.

The question is why is it necessary to try to adjust the law to create that kind of a situation when you're recognizing that the products you're talking about are inherently different. There are two different types of things we could be talking about with an e-book.

Are we talking about a scanned book where in the simplest form a book is scanned into a digital format so that what you now have in that digital version is what you had in the book?

Or are we talking about an e-text where built into that e-text is additional material that is of interest to the reader because it relates to the author or provides further background on the subject matter of the book? Or, as I said before, it allows a search capability or an ability to store and retrieve annotations.

In the example that David gave, would we be talking about transmission of exactly that same product? If the book came under an arrangement where you paid for it and part of your deal was to get all of these added value types of uses that you could make of it, is that transferable as part of the digital first-sale doctrine or is it just the scanned text of the book?

MR. NEAL: I think we're in a situation where we can no longer define quality as equal to content. We're in an environment where quality equals content plus functionality and I'm agreeing with you.

MS. PETERS: He had to say that because we wouldn't have gotten --

MR. NEAL: However, I just heard Allan say we are dealing with a media that is fundamentally different and, therefore, is it not appropriate for us to think about and look at the public policy issues that can effectively embrace media and technology which is fundamentally different.

MR. ADLER: And we're not objecting to the examination. We are objecting to adoption of your proposals.

MR. NEAL: I heard you.

MR. CARSON: I'd love to keep chatting with you folks all day but I think we have to get to the schedule.

MS. PETERS: Jeff. No questions? Jesse?

MR. CARSON: I think we need to move to the next panel.

MS. PETERS: Okay. Because of time we're basically -- yes, you have for the record.

I want to thank the panel very much. It was very helpful. I'm sure you'll hear more from us.

Allan, you can give us the articles that we'll make part of the record.

MR. ROHDE: I have to go.

MS. PETERS: You have to go. I know. Secretary Rhode, thank you so much for being here.

All right. Can I call the second panel.

Okay. Our second panel has come to the table. The way it is listed is Keith Kupferschmid representing the Software and Information Industry Association is listed first. Dr. Lee Hollar, University of Utah listed second. Scott Moskowitz from Blue Spike, Inc., is third. Emery Simon from Business Software Alliance is listed fourth. Nic Garnett for Intertrust Technologies Corporation is listed fifth. I'm going to suggest that we testify in that order. Why don't we start with you, Keith.

MR. KUPFERSCHMID: Thank you very much. Good morning. Keith Kupferschmid, Intellectual Property Counsel for the Software and Information Industry Association. I do appreciate the opportunity to testify here today. In particular I would like to thank the Copyright Office and NTIA and the panelists for conducting these hearings.

By way of background, SIIA is the principal trade association of the Software and Information Industry. We represented over 1,000 high tech companies that develop and market software and electronic content for business, education, consumers, the Internet and entertainment.

Our membership is quite diverse. We have information companies such as Reed-Elseveir and West and McGraw-Hill. Software companies like Oracle, Sun, and Novell and digital rights management companies such as Aegisoft, Media DNA, and Publish One.

Our members are extremely interested in issues relating to the interplay between new technologies, e-commerce, and the copyright law and in particular, Section 109 and 117 of the Copyright Act which is the focus of this hearing.

In the interest of time I will summarize SIIA's views on Sections 109 and 117 and respond to some of the comments that were previously submitted and stated here today.

As you know, Congress intended the first-sale doctrine to be used as a means for balancing the copyright owner's right to control the distribution of a particular copy of a work against the public interest in the alienation of such copies.

Those who support expansion of Section 109 would like you to believe that alienation means alienation at any cost. They would have you pay minimal regard to the copyright owner's interest. This simply is not and should not be the case.

The purpose of the first-sale exception is not to give unlimited ability to individuals who distribute their copies of a work. Rather, it is to permit individuals to distribute their particular lawfully owned copy of a work only when the distribution of that copy would not conflict with the normal exploitation of the work or adversely affect the legitimate interest of a copyright owner in that work.

As I am sure you are aware, this is the international standard set forth in TRIPS, the Berne Convention, and the WIPO Copyright Treaty. I submit that amending Sections 109 and 117 as suggested by some of the commentators would run afoul of these international obligations.

Congress, too, has recognized this balancing act. For example, Congress has restricted the public's right to alienate a work by providing owners of certain copyrighted works with a right to control the rental of those works.

Congress clearly saw the first-sale balance tipping against copyright owners and sought to rectify the situation. Interestingly, when Congress enacted the DMCA they were lobbied by those who believe that the first-sale scale had tipped the other direction.

Congress did not agree, however, and soundly rejected proposals to expand Section 109. The same was true of proposals to expand Section 117.

Much has changed with regard to technology and with regard to business models since Congress considered and rejected proposals to expand Section 109 and 117. The existing scope and the text of Sections 109 and 117 do not appear to have any adverse effects on the public's ability to dispose of their copyrighted works or to make backup copies of their software.

Furthermore, the provisions of the DMCA relating to anti-circumvention technologies and copyright management information have likewise had no adverse effects on the operation of the first-sale doctrine or Section 117.

I know my time is limited but I can't help but notice and highlight the irony here. Our opponents stand before the Copyright Office and NTIA requesting a change in the law in an area where there has been not one -- repeat, not one case that they have pointed to for the proposition that Section 109 or 117 needs to be expanded.

On the other hand, for almost five years SIIA and many others have been supporting database anti-piracy legislation. Over the past nine months alone there have been about seven cases dealing with piracy of databases.

Virtually all of these cases were lost by the database producer because neither contract law, copyright law, misappropriation law, or trespass law would protect them.

Many other instances of database piracy never even make it to the courtroom. Ironically, many of those who propose expansion of Section 109 and 117 also oppose database protection, as you heard here today. They say no need has been shown.

I find this pretty amazing. If according to the libraries and others no need has been shown by database producers where we, in fact, can point to numerous injustices, how can they honestly claim that they have established the requisite need to make the changes they suggest when they can point to no such injustice.

Furthermore, it is also noteworthy that most of the commentators that support expansion of Section 109 and/or Section 117 fail to discuss how the fair-use doctrine would apply to these situation and why it would not sufficiently address their concerns.

It is not possible to fully consider the merits or lack thereof of proposed amendments to Section 109 and 117 without such a discussion. We, therefore, respectfully request the Copyright Office and NTIA to ask these organizations during the course of these hearings to explain why the fair-use doctrine does not apply or would not protect against the concerns identified in their comments.

Now, to briefly address some additional issues relating to Section 109. As stated in more detail in our written comments, it is SIIA's position that the first-sale doctrine plays no role in present day digital distribution methods because such methods do not involve the transfer of one's particular copy of a work, and because such methods require the making of a second generation copy of a work thereby implicating the copyright owner's reproduction right, a right that is not exempted by Section 109.

In discussing Section 109 the Library Association comments raised several issues that are irrelevant to the Section 104 study. For instance, the Library Associations complained of monetary constraints and administrative problems such as difficulty keeping track of passwords for off-campus users, inability to make works available to visiting professors, alleged invasions of privacy, and lack of expertise in interpreting contract terms.

While we sympathize with these concerns, truth be told, these concerns are internal administrative problems not unlike the problems that many organizations face. They have nothing whatsoever to do with the first-sale doctrine or Section 117.

Some commentators suggested that Section 109 should be expanded to apply when a person transmits a copy to another person while simultaneously destroying his particular copy at the time of transmission.

Several of those who support a simultaneous destruction proposal suggest amending Section 109 as originally proposed in HR 3048 from the 105th Congress and rejected by that Congress.

As explained more fully in our written comments, this proposal ignores some of the practical impediments inherent in the distribution of copyrighted works that are contained on traditional media that limit the applicability and use of the first-sale doctrine.

In the digital environment the integrity of a work never becomes relevant. As a result it is possible that even one copy of a copyrighted work could potentially serve the entire market for that work.

In effect, each possessor of a digital copy of a book could become its own bookstore or library. Each possessor of an MP3 file its own record store. Each possessor of a DVD its own blockbuster or movie theater. This holds especially true with recent peer to peer technologies like Gnutella that permit one copy of a work potentially to serve millions.

Clearly no copyright owner could stand to stay in business very long if its market is usurped by a handful of copies transferred among an innumerable amount of consumers.

In the physical world, the redistribution of a particular copy under the first-sale doctrine is restricted by geography, by the circle of people known to the holder of that copy, and by the time and effort necessary to redistribute that copy.

These inherent constraints on the first-sale doctrine limit the potential effect on the market for that work. In the digital world, however, redistribution is limited neither in geographic scope nor to known people.

Instead, digital content can be transmitted to millions of people both known and unknown at the stroke of a key or click of a mouse. As a result of the dramatic increase and the ease by which digitized work can be made available to others, the number of times a work is transmitted from one party to another would substantially increase which in turn would significantly diminish the copyright owner's ability to obtain a fair return from that work.

Most significantly, the simultaneous destruction proposal also has some significant evidentiary and procedural problems that make it infeasible as mentioned by some of the others who testified.

For instance, it would not be possible or practical for the copyright owner or the courts to verify that the source copy was discarded. Even if it was possible to determine that a source copy had been discarded, it would not be possible to verify that it was done so simultaneously.

It has been suggested that these evidentiary and procedural concerns could be avoided by the use of technological protections. The problem with this recommendation is that technology is not now available that would effectively perform this function.

SIIA has been an active supporter of digital rights management technologies. We have a whole division dedicated to supporting companies whose business is to develop and market DRM technologies. There is nothing I would like to do more than to stand before you here today and promote one or more of their technologies.

Unfortunately, I am unable to do that. Many of our members have been working tirelessly to develop DRM solutions that would provide at least a partial solution to the first-sale questions raised here today. Regrettably they have been unable to do so in a way that directly mirrors the law.

Therefore, with regard to the first-sale exception, SIIA strongly urges the Copyright Office and NTIA to reaffirm the status quo by making clear in the Section 104 report that the first-sale exception does not apply to digital distribution mechanisms such as the Internet. And given the congressional intent underlying the first-sale doctrine, the ease by which consumers have and will have access to a wider variety of copyrighted works than ever before, and the potential harm to copyright owners caused by the proposed amendments of Section 109, there is no need for the first-sale exception to be expanded into the digital distribution environment.

With regard to Section 117, SIIA strongly believes that there is an immediate and important need for the public to be educated as to the scope and effect of Section 117. The days of people using 117 as an excuse for software and content piracy must come to an end. The only way to do this is through a systematic and sweeping process of educating the public.

Several commentators suggest that there is a need to expand the scope of Section 117 beyond computer programs. We respectfully disagree with these suggestions. Section 117 was enacted at a time when software was primarily distributed on floppy disks that could be damaged by inadvertent scratching, bending, or demagnetizing the disk.

As a result, the need to make a backup copy of your software in those days was essential. Unlike when Section 117(a)(2) was first enacted, today it has little, if any, utility. Technology and business models have evolved considerably. Nowadays software is primarily distributed on CD-ROMS, not floppy disks.

According to statistics from PC Data, 97 percent of all software sold in the United States in 1999 was sold on CD-ROM. In the year 2000 to date 98 percent of all software was sold on CD-ROM. Once a computer program is loaded from a CD-ROM to one's computer, there is no need to make a backup copy because, in effect, the CD-ROM serves as that backup copy.

In addition, the potential of inadvertently damaging a CD-ROM in a way that makes the software contained on that disk inaccessible is an extremely -- extremely rare occurrence. More significant is the advent of the application service provider model, the ASP model or, as we refer to it, software as a service model.

This model provides the potential for software to evolve away from the individual desktop and/or network to a server hosted by a copyright owner or authorized distributor on the Internet. There the software can be accessed anytime and anywhere by the user thereby eliminating the need for individual backup copies.

As a result, in the future the need for the provisions in Section 117 relating to the making of a backup copy will no longer exist. Thus, extending Section 117 to apply to other works when it has little or no use today in our view makes very little sense.

Before closing I would like to mention that I have noticed on the panel here there are several individuals testifying today that have not previously submitted written comments to the Copyright Office or NTIA on these issues.

I respectfully request that those who did submit comments or reply comments be given the opportunity to respond to their statements made here today through post-hearing written comments, after the transcript of this public hearing is released.

We would like once again to thank the Copyright Office and NTIA for providing with us an opportunity to testify and I look forward to answering any questions that you may have. Thank you.

MS. PETERS: Thank you.

DR. HOLLAAR: My name is Lee Hollaar. I'm a Professor of Computer Science at the University of Utah. Looking at the agenda I'm the only person here not representing any organization or company. I speak only for myself.

I wish I was here as a technologist to say that I have the solution to this, that there is, in fact, going to be something that allows for the destruction of copies when they are passed on to someone else. I don't believe that's going to happen.

I don't believe that we will have the security that the content providers want, coupled with the convenience -- especially the ability to run it on their own PC and their own choice of operating systems -- that the consumers want and that the privacy advocates want. I hope that I'm proven wrong but I don't believe that is going to be the case.

But I'm not really here to speak on that. I'm not really here to speak on the big issues. I'm here to speak on what might be a footnote to your report.

While it would be good to provide education to users about what Section 117 is so they realize that it's not a wholesale right to do anything they want with anything that is digital data, as Section 117 is written it really goes against the experience and procedures that people use for archiving. I'm going to talk about archiving in particular.

Section 117 prescribes a particular style of archiving, essentially making a copy of an individual program at the time you get it.

I submit that if, in fact, your organization is following that type of regime, you should be firing your system administrator because most organizations, mine in particular and I would guess virtually every other one, does archiving by means of a wholesale backup of everything on their disk whether it's every night, every week, periodically.

I know I do it myself on my personal machine. I bought along something that I'm not going to leave which is an archive of my home directory on my machine and the directory for my wife and for our financial information. It's written on a CD-ROM.

I fully expect that the only thing that will happen with this CD-ROM is it will be thrown away, broken up when I make the next CD-ROM of backup.

This points to a very particular thing for this type of backup.

One is that on this I've not only copied data of mine but I have copied other commercial software that happened to be things that I installed in my home directory. I copied not only the programs but I copied data that came along with the programs, even though 117 doesn't give me any permission to copy that data but it was necessary. It was configuration files and so forth.

I copied other files not related to computer programs that I got from commercial sources, whether it was copies that I made from databases or webpages saved or whatever on there. That's not anything provided by 117.

More importantly, if my use of a particular program no longer becomes rightful, primarily because I've gotten a new version of the program, I've gotten an upgraded version, the version that I had is now obsolete and I no longer have the right to use that. I have the right to use the new one.

I'm certainly not going to go back and find the CD that I wrote and try an attempt in some way to delete that from the CD, much as the people who are your systems administrators aren't going to go back and on their archive tapes when you send them notes saying, "Well, I've upgraded from MicroSoft Word 97 to MicroSoft Word 2000. Please go back and delete the copy of MicroSoft Word 97 you have in all your archive tapes going back maybe three or four years." If you do that, they will laugh at you.

Anyway, why does this make a difference? Why should we be concerned? Well, if we're going to try to teach people to respect Section 117, it needs to match reality.

If I'm speaking for anyone, I'm speaking for about two dozen students, mainly computer science students, who are taking a course in intellectual property law from me this semester and just by coincidence had as a mid-term short essay question, "Comment on Section 117. Do you think that it matches the reality of the current situation and, if not, how would you change it." No one thought that 117 matched the reality of how file archives are made today.

When you have that and people don't feel that something matches reality, it's going to be very hard for them through an education program to believe in the law, to follow it.

It will be much like the ill-fated 55 mile an hour speed limit where we imposed a speed limit that people knew didn't match the conditions of the road and was more observed in its breech than in its following. If you drove -- I don't know how it was here but if you drove in Utah where the roads aren't quite as crowded -- at 55 miles an hour, I can guarantee you were consistently being passed by people.

Yet, in Utah when the speed limit was raised to speed limits that matched the road, probably the average speed on the highway went down because they found the law more reasonable.

I'm here arguing for a footnote. If you are going to amend Section 117, and especially if you are going to educate people on the importance of it, at least amend it in such a way that it matches the reality of how archiving is done.

Otherwise, you run a situation where people are not only disrespecting it, but you run a situation where if anyone actually tried to bring me in for copyright infringement for the CD, you would have the judge trying to be as creative in the interpretation of Section 117 as they could because they wouldn't find that an infringement.

In their creativeness they would probably come up with something that would upset any sort of delicate balance you put together. They would probably find that computer programs, which means something that instructs the machine, includes data because, of course, data changes the behavior of the machine. All the hard-fought compromises could disappear. Thank you.

MS. PETERS: Thank you.

Mr. Moskowitz.

MR. MOSKOWITZ: I'm Scott Moskowitz and my company is called Blue Spike.

When Thomas Jefferson said "information wants to be free," he meant freely accessible. Available to the eyes and ears of people who wait to be enriched by new knowledge and experience.

That concept has informed much of our politics, influenced our copyright laws, and not incidentally helped to build robust consumer markets. Threats to all these advances by lock and key systems for securing copyrighted works is something that greatly concerns us.

Restruction systems confront all the good things that open and free access to information has demonstratively engendered. Access restriction technologies threaten the viability of a robust and fluid market for creative works.

Blue Spike is the leading developer of

secure digital watermarking technology for use in copyright management systems and other applications that can create trusted systems as a means of balancing the interest of copyright owners and information consumers.

Digital watermarking when properly implemented enables differentiations to be made between seemingly identical digital copies. As such, digital watermarks act as receipts for the commercial exchange of valuable information.

Blue Spike has taken its place as a dissident proponent of copyright security systems. The company develops technologies that probably secure copyrights of digital assets like music, while at the same time preserving the accessibility of those assets for consumers and users. In this way our technology reflects the principles for first-sale and fair-use doctrines that access restriction schemes jeopardized.

We appear today to make two principal points. First, Congress should be encouraged to amend Section 109 of the Copyright Act to create the digital version of the first-sale doctrine.

Second, Congress should be encouraged to adopt changes to Section 117 that recognize the centrality of ephemeral copying to the operation of the Internet and more consumer products.

Blue Spike believes that updating copyright law in these ways is necessary for the Internet to mature as a delivery channel for digital information products. Moreover, it speaks to the preservation of copyrights balance of interest.

Blue Spike believes that Section 209 of the Copyright Act should be amended to include digital transmissions as proposed in Section 4 of HR 3054 by representatives Rick Boucher and Tom Campbell. It is a vital and common sense extension of the first-sale doctrine that would bring relief to librarians, information carriers, and consumers.

Today users of digital information work under a cloud of uncertainty as to how the law applies in their handling of digital contacts. The Digital Millennium Copyright Act in addition specifically prohibits certain transformations of digital content, provisions with the potential to impede workaday storage, archival, and retrieval functions.

Blue Spike suggests that Representatives Boucher's and Campbell's amendment would give relief to users and curators of digital information and update copyrights reflect contemporary context.

With respect to the concerns of the

copyright holders, Blue Spike notes the first-sale doctrine would only apply if the underlying work were actually deleted just as it only applies when you physically hand an analog original to someone today.

The consequences of allowing the law to lack digital technology would be felt by educators, librarians, consumers, and, not coincidentally, by technologists.

Content owners and providers understand the marketplace of ideas. They have little interest in the archival requirements of universities and libraries that must be able to make copies of works in different formats in order to ensure continuity of access and to serve their constituents.

Moreover, leaving digital works uncovered by first-sale doctrine gives copyright holders and the technologists who develop copyright security schemes little impetus to develop more nuance and context appropriate means of securing their works against infringement that access restriction systems.

The environment in which certain kinds of copying were protected under first-sale doctrine technologists and content owners would be pressed to explore more innovative means of securing copyrights than digital catalogs.

This modification of first-sale doctrine will preserve a lot of the rights that content users enjoy now. It will not change the kinds of protections that content owners can provide for their digital assets, though we believe expansion of fair-use doctrine will spur further exploration into copyright control schemes beyond lock and key systems.

In the context of marked development, if the law keeps pace with technology, content owners and consumers will benefit the greatest extent as new communications, media, and Internet technologies generate recognition and demand for artists work.

Blue Spike believes that Section 117 of the Copyright Act should be amended to provide that it is not an infringement to make a copy of a work in a digital format if, first, such copying is incidental to the operation of the device in the course of an otherwise lawful use of the work and, second, if it does not conflict with the normal exploitation of the work as proposed in Section 6 of HR 3054.

Adoption of this provision will simply make the law cognizant of the fact of life in the digital age. The Internet and increasing numbers of electronic devices cannot function with ephemeral copying.

The Internet functions by delivering copies of documents through a publicly assessable network. Those copies are further cached on PCs and various terminal devices. Today many consumer electronics products already use some form of caching to deliver content. Tomorrow even ordinary radios and televisions will rely on caching functions to allow quick and convenient review of content. The law must reflect this reality.

Further, the Internet has evolved very rapidly in ways that are historically unprecedented. There is no vail doctrine to synchronize development and regulation for ISPs, or Internet Service Providers, the way there was for the deployment of our national telephone network, the Internet's most successful analog.

Subsequently, ISPs have been placed in jeopardy on a number of different fronts only partially ameliorated by provisions of the DMCA. Section 6 of the amendment would further reduce the risk of potential legal liability for ISPs and others and thus would encourage greater use of the Internet to disseminate copyrighted works.

Here we see the need for greater intelligence on the movement of copyrighted works rather than on restricting access, a task for which digital watermarking is uniquely qualified.

When watermark registers the responsible parties for production and distribution of a digital content, object copy X issued to distributor Y, those parties can be called to answer for their indiscretions placing incidental ISPs out of the field of contest.

In conclusion, we believe the proposed revisions to the Copyright Act proposed by Representatives Boucher and Campbell and co-sponsored by over 50 of their colleagues would represent more than wise lawmaking. They are necessary to ensure that the digital future is at least as rich as our analog past.

Copyright and the doctrines that have extended from it have provided formidable benefits to markets and societies. They will continue to be our silent benefactors if we work to preserve the balance that defines the new law.

The lock and key systems that are being proposed today to control access to copyrighted digital works upsets that balance and confronts the law. Unfortunately, the DMCA has legitimized their de facto trumping of copyright law and convention.

Intelligent and imaginative use of technology for content distribution and content protection within the bounds of an up-to-date copyright law rather than the threat of litigation will better promote the interest of content owners and society at large.

If there is one man-made structure that does not turn to dust, it is the temple of human knowledge. We are all products of it. We are all beneficiaries of it profiting every day from the culture and commerce which proceed from it.

When a toll gate is being erected at the entrance of that temple, we should interrogate those who would build them and measure the true cost levies they would impose. Thank you very much.

MS. PETERS: Thank you.

MR. SIMON: My name is Emery Simon and I want to thank you for letting me testify today. I'm here on behalf of Business Software Alliance, an association of hardware and software companies.

I should say at the outset that each of the member companies in the BSA is a for-profit corporation. A lot of what we have before you is really not so much whether e-commerce is working or whether files are being distributed but really what we have is a little bit of a disagreement about what the prices should be and what the business model should be.

Unfortunately a lot of that is being reflected in fights about legal issues and I'll come back to that in a second.

I was also happy to hear Scott's testimony of digital watermarks as a solution to all of our problems. That's a good thing.

It is our understanding that the Congress erected this study because at the time of the enactment of DMCA to determine the changes of Section 109 and 117 were not merited beyond a small change to Section 117 on prepare and maintenance.

Congress erected the study as a judicial measure to ensure that its enactment of the DMCA and intervening developments and technology did not harm the marketplace. The test we are looking at here is has something happened to the marketplace that would justify further changes in law.

Congress found no compelling evidence in 1998 and the changes were merited. It's our conclusion having reviewed the submissions and marketplace developments that intervening development do not justify a different conclusion today.

To the contrary, we find that some of the changes proposed in the submissions to the first-sale doctrine and temporary copies, which is the way that I will colloquially refer to the 117 issues, would harm the marketplace and impede development of important business models now evolving in response to consumer demands.

BSA member companies approach these issues with two considerations of equal importance. I want to really stress that. First, our member companies are determined and committed to making the Internet and e-commerce grow and thrive. BSA member companies make computers, software, servers, switchers, that make e-commerce possible.

Many of these companies are also in the business of providing web design, data management, posting, and other critical services. As importantly, these companies suffer substantial losses due to piracy amounting to billions of dollars each year.

Mr. Petersen earlier this morning said, "Where is the evidence of the loss?" Well, we would be happy to sit down with him and show him the numbers.

Strong copyright protection is the essential tool to rely on to attack theft. Copyright protection is also what we rely on to write licensing agreements.

Many of these submissions suggest that e-commerce will wither unless changes are made to Section 109 and 117. We see no evidence in the marketplace that would support such conclusions.

Here are some facts. Under current law recent estimates suggest that e-commerce has grown tenfold over the past three years and will continue to explode over the next five years.

By 2005 BSA CEOs anticipate a compelling 66 percent, two-thirds, of all software will be distributed over the Internet compared to only 12 percent today. This will account for about $40 billion in sales we think.

Having set the context, I would like to focus on the issues of amending Section 109 and 117. A number of submissions urge the report to recommend enactment of legislation, those introduced in 1998, the Boucher bill, which failed to pass the Congress. It's important to remember that. It's not that the Congress didn't consider it. They just chose not to enact it.

These proposals and submissions would change the first-sale doctrine to make old copies of software acquired over the Internet whether by purchase, sale, lease, or license, transferable regardless of the terms on which the copy was acquired.

Let me point out that the matter of digital copies or digital works is not a matter of first impression for first-sale doctrine for Congress considering the issue. The Congress amended the first-sale doctrine to specifically deal with digital products called computer programs and to deal with the sale, lending, and leasing of computer programs.

It created specific rules because it felt that the danger was higher and, therefore, it limited the applicability of the first-sale doctrine with respect to those digital codes with those digital works.

Proposals also propose extending Section 117 to cover not just backup and archival copying of computer programs but, in effect, any temporary copy made in the course of its use.

In particular, they argue that buffer copies should be exempt from liability. While the term buffer suggest something different, this is, in effect, the same as saying that RAM copies should be exempt from liability. We have a fair amount of case law currently, very little of it disputed, about what copies in RAM mean in respect to the reproduction right.

We believe that such a provision would do enormous harm to the software industry, in effect, depriving software developers the right to choose the business model they used to commercialize their products.

Today most software products are leased or licensed rather than sold. This practice has evolved over the past 20 years largely in response to marketplace forces. This practice from its customers to obtain volume discounts as well as regular updates as products are improved.

In addition, it gives companies the flexibility to add users to the software as the business or user base grows subject to certain fees and conditions contained in the license. I admit it up front we are for-profit companies.

The changes proposed for first sale and temporary copies would create substantial disruption to the marketplace calling into question the viability of these well established business models we believe.

In effect, holders of rights guaranteed by federal law, property interest guaranteed by the

Copyright Act, would be deprived of the right to choose the ways that commercially exploit their works.

This would threaten the copyright law into a marketplace regulation governing licensing and business choices rather than a law on the rights of authorship.

What is being proposed is to deprive both authors and their customers the right to choose the commercial model best suited to their respective needs. I respectfully submit to you that such interference with private rights and the marketplace for software and other works is unwarranted, is unsupported by current developments in the marketplace.

Let me turn briefly to the question of temporary copies. Most popular software programs are very large consisting of millions of lines of code. Computers work by processing data in chunks. These chunks of data are stored, buffered, or cached in RAM waiting for a call from the processor as it becomes ready to assimilate additional information.

This is simply the way all computers work, the way all digital devices work as they process digital data. Proposals before you would put these copies of portions of a program outside the scope of the reproduction right.

Our member companies which make the devices that perform the buffering and caching functions do not see the logic of creating exemption for the reproduction right for these functions. We have not seen litigation that would raise in our minds serious concerns.

Creating such exceptions could, however, have dire consequences for the industry. If potential software piracy problems consist of unauthorized use of software over local area networks. Piracy results of the number of people using a software program stored on a central computer known as a server exceed the number of licenses that the local area operator has purchased from the copyright holder.

In the LAN environment only one permanent copy needs to be installed on the server. Anyone connected to LAN through a personal computer, handheld organizer, telephone, any other device, can make full use of that software by making temporary copies of all or part of that program in random access memory. There is no need to make a permanent copy of the software on the internal memory of the PC or device to enjoy the full functionality of the software.

Given the ambiguity of LANs denying the

software copyright owner the ability to control temporary visual copies in this environment significantly diminish the value of the software. Using software on the Internet takes place essentially the same way as in the local area network environment but on a vastly larger scale.

As in the case of LANs, Internet basic exploitation takes place through the creation of temporary digital copies of some or all of a computer program in RAM. Other than the single original copy on the host computer or server, no permanent copies need be made.

The hottest development in the software market, Keith mentioned it, is the emergence of application service providers. ASPs permit a company to use a software product without having to buy it or having to install it on a local computer. The software is accessed as needed at a substantially lower cost over the Internet, for example, once a week to write checks for employees or to do basic bookkeeping.

ASPs are popular because developing and maintaining information technology can divert in-house resources away from a company's main line of business. Companies are increasingly out-sourcing their business software needs to outside vendors such as ASPs.

Companies find out-sourcing attractive because it reduces the burden of maintaining in-house software system reducing the need for information technology staff, allows faster access in your software, and it creates predictable cost structures for software use by substituting standard monthly service charges for up-front payments. The demand for ASP services is expected to go rapidly, by some estimates exceeding $21 billion by next year.

In each of these instances the full commercial value of the work is contained in that temporary copy. I raise this point because some of the submissions argue that a temporary copy has no separate economic value. It should be excused from the copyright law. I think this is a false premise.

The marketplace evidence is clear, our customers are becoming less interested in possessing a copy of our products than having them available to them as they need them.

That's what an ASP model is all about. If you don't buy the product, what you do is you license it. You lease access to it when you need to use it. Because a lot of software works by the computer's RAM it creates a copy that can be perceived, reproduced, or otherwise communicated as defined by the Copyright Act.

The leading case in the area, MAI v. Peak, held that such loading into RAM is a reproduction and is subject to the reproduction right. This legal conclusion was, in fact, endorsed and affirmed by the Congress in the Digital Millennium Copyright Act, Title 3, which creates an exception for making a copy of a computer program by switching on a computer for the purpose of maintenance or repair.

This exception would have been wholly unnecessary if the Congress had concluded that temporary copies should not be subject to protection, or if Congress had concluded that a different kind of limitation on such protection should be needed.

Moreover, Congress had the ample opportunity at that time to create an exception but it did not. Nothing has changed in the meantime.

In conclusion -- those magic words -- every indication from the marketplace suggest that e-commerce and the Internet continue to grow vigorously. Over the past two years since the enactment of the DMCA that growth has accelerated. Thus, the evidence is simply not apparent that changes in law are needed.

On the contrary, based on the business

models now being utilized by the software industry, we believe that changes in law would be harmful to e-commerce, consumer choice, and the marketplace for computers and software.

I've got one more thing to say. There was a fair amount of criticism this morning about UCITA and its enactment in Maryland. I, too, am a Maryland citizen and I think it's a good thing.

The basic criticism of licensing models, as I understand it, by the library community and others is that it permits the licensor to impose conditions through the license. That's what all licenses do.

When I lease a car the licensor is imposing conditions on what I can do with that car and when I have to return it and what mileage I can put on it. It is not an aberration in a commercial environment for people through contractually agreed terms to agree to perform certain things by contract. They agree to limitations and obligations through a contract.

The common law in Maryland, as in other states, has long affirmed the validity of licensing arrangements for computer programs as well as for other copyrighted works. UCITA is simply a codification of the common law. It has greater specificity. It creates less ambiguity.

In fact, I was interested to hear this morning that the biggest threat out there is ambiguity. Well, what UCITA cures is ambiguity and inconsistency between the state common laws as they apply to licensing transactions and information.

If you think that ambiguity is a bad thing, which we do, we think clarity through licensing and contracts is a good thing. I guess I'm a little confused by how one kind of ambiguity is good but the other kind is bad.

Thank you.

MS. PETERS: Thank you.

MR. GARNETT: Good morning. My name is Nic Garnett and I work for Intertrust Technologies in Santa Clara, California. On behalf of Intertrust I would like to thank you for this opportunity to testify before you this morning on this important issue, in particular the first-sale doctrine and its relationship to digital transmissions.

Intertrust Technologies Corporation is a developer and provider of digital rights management technology and solutions known in short as DRM. DRM has been the subject of comments by many organizations participating in this study to date.

As a DRM provider Intertrust thinks it can lend some useful insight into the state of DRM technology and its deployment in the marketplace by our customers and partners which include copyright owners as well as aggregators and disseminators of copyrighted works in electronic commerce.

To begin with, Intertrust believes that electronic commerce and copyrighted works has somewhat lagged due to the lack of a trusted and consistent environment that neutrally supports the rights of both owners and users of copyrighted works.

For example, disseminating copyrighted works in digital form often makes such works vulnerable to unlawful reproduction and distribution of such unauthorized copies.

On the other hand, this very character creates new opportunities for copyright owners to disseminate their works, such as the viral adoption of new works and services, and opportunities for consumers to use copyrighted works in ways that are significantly more flexible than those afforded by the mere purchase of a copy.

Intertrust obviously believes that DRM technology and our solutions are essential for electronic commerce in copyrighted works to flourish and reach its full potential.

In order to manage the risks and the opportunities of digital dissemination, the creators, publishers, and distributors of digital content as well as service providers, governments, institutions, and users must be able to create digital content secure in the knowledge that their ownership rights can be protected.

They must also be able to associate rights and rules regarding ownership, access, payment, copying, and other exploitation of the work. DRM can provide the means to do all that and, thus, to create a trusted digital environment for disseminating and using copyrighted works.

It think it's important to understand that the generic term DRM covers a vast range of technology and enterprises. I think it's also important to understand that term can be used to refer to specific business models and the principles that I'm trying to advance here are that we should look at DRM as a process rather than a specific business model.

Effective DRM solutions such as those provided by Intertrust and its partners comprise technological measures as well as a trusted neutral third-party administrator to protect the integrity of the technology and manage its continual adaptation, including the development of rights and commission practices, to changing technologies and user's needs.

One of the focuses of the way that InterTrust is deploying its DRM technology is to provide a basis upon which copyright owners and consumers can come together to form arrangements protected by technology implementing any number of different business models on the part of the copyright owner.

For example, apart from the mere sale of downloaded content, one can think in terms of subscription models for the delivery of music, for example. There's a very important dimension of this process as well which we call super distribution: the idea that the protection system can accommodate the downloading of content to consumer A and also permit the transfer by that consumer of the content and the rules for its utilization to consumer B.

In other words, our system would support models which actually encourage the transfer of copyright material on a protected basis from one consumer to another.

So as seen by these examples, the purpose of DRM solutions is three-fold. First, to enable copyright owners to manage their exclusive rights effectively throughout the electronic commerce value chain. Two, to provide maximum flexibility in the arrangements struck between copyright owners and their customers. Three, to provide a neutral and trusted environment in which technology guarantees these arrangements.

Thus, these sophisticated DRM solutions are entirely consistent with the key objective of copyright law, to protect the rights of copyright owners while promoting wider dissemination and greater access to copyrighted works.

Nonetheless, a number of organizations have expressed concerns that DRM technology and electronic commerce could impair operation of Section 109 of Title 17 and have called for its scope and, thus, its limitation on right holders, to be expanded.

Such concerns appear to be, at best, premature. Digital delivery coupled with DRM will improve the dissemination and use of copyrighted works in new and more convenient ways.

Moreover, it's important to recognize that the first-sale doctrine continues to apply in the digital environment. It's also important to recognize that the operation of the first-sale doctrine is limited to the exclusive right of distribution of copies and does not limit application of the other rights of the copyright owner: reproduction, adaptation, public display, and public performance.

Therefore, digital delivery of a copyrighted work does not necessarily mean that a copy has been delivered. Technologies such as digital broadcast and audio/video streaming may not deliver a copy at all. This is especially the case of a streaming transmission secured by various DRM technologies that prevent the recipient from making a copy of the transmission.

It is also important to recognize that the operation of a first-sale doctrine is limited to situations in which ownership of the copy is transferred from the copyright owner to another party.

Even in those circumstances in which digital dissemination does, in fact, deliver a copy of the work, that delivery does not necessarily mean that the party has expected that the ownership of a particular copy has changed hands.

For these reasons great caution should be exercised in considering proposals to alter such a fundamental tenet of copyright laws as the first-sale doctrine.

Doing so could unsettle long-established legal rights, thus making electronic commerce more uncertain. It could also have the effect of favoring one business model over the other.

Moreover, such changes could constrain the development and use of DRM technologies and solutions. The unfortunate result would be to discourage the lively experimentation necessary to develop viable sustainable electronic commerce in copyrighted works.

In conclusion, therefore, there is no single concept or model of DRM technology and, a fortiori, any single or common feature of DRM that is somehow restricted or impeded by the current functioning of Section 109. Thank you.

MS. PETERS: Thank you.

I'm going to start the questioning where we hadn't before.

Jesse.

MR. FEDER: Keith, could you please elaborate a little bit on how international obligations come into play in these issues? You had raised that issue in your testimony.

MR. KUPFERSCHMID: With regard to all the agreements I mentioned, the Berne Convention, TRIPS

Agreement, WIPO Copyright Treaty, all of them set forth a specific standard, that standard being that the legitimate interests of the copyright owner are not adversely affected.

With the proposals that are suggested, I think someone in the earlier panel here today mentioned he didn't know whether some of the language was intended to be so broad because it certainly didn't match the purpose for which some of the proponents of the broadening of Section 109 were going after.

That language can be read very, very broadly. For instance, if Section 109 is broadened out to cover reproduction, which existing Section 109 does not cover right now, aside from the whole simultaneous destruction issue, read reasonably, then I think, would adversely affect the copyright owner's interest to such a degree that it would offset the balance that all these three treaties support and the standards that have been set. That's our views on that.

MR. FEDER: Okay. I believe you were here during the last panel and you heard David's question to Mr. Sorkin and Mr. Attaway concerning a hypothetical technological system that enforced the simultaneous destruction concept -- that permitted the transfer of only a single copy and automatically destroyed the original. Putting aside the question of whether that's technologically feasible, if such a system existed, would you still have objections to amendment of Section 109?

MR. KUPFERSCHMID: I think that is a very, very large assumption but let me certainly address it. I would not necessarily have an objection to amending 109 if it accounted for such technologies provided the use of those technologies would further promote e-commerce and emerging new technologies and the copyright law, the purposes of the copyright law.

SIIA believes that there are certain basic principles that should be considered in relation to Section 109 and that these principles should take into account the interest of copyright owners, creators, and publishers and the practicality of the technology.

Let me go through some of these principles which represent a minimum standard. It doesn't include all principles certainly. Any technological protection, first of all, must be protected by 1201. It could not be exempted by 1201 of the DMCA.

The use of the technology must be voluntary. Copyright owners shouldn't be required to use the technology. The technology should not impose substantial costs on copyright owners, should not impede the incentives underlying the Copyright Act to create and distribute new works of authorship, and should not burden or adversely affect the copyright owner's interest in exploiting the work itself.

The technology protection that is actually used, or codified if that's what you're proposing, should be developed pursuant to a broad consensus of copyright owners and other relevant industry representatives and should be made available to those copyright owners on reasonable terms.

Perhaps most importantly the technological protection itself must prevent a person from transferring what I call the source copy to more than one person. As Bernie mentioned earlier, you couldn't send it a 1,000 of your closest friends. The technology shouldn't allow that.

Secondly, the technology should attach to any generational copy. In other words, if you had that technology on a certain content and you are sending that content to someone else, that technology should accompany the content.

The technology also should prevent the source copy from being transferred unless the transferor retains no electronic or nonelectronic copy of the work regardless of the format.

For instance, if you had software that was on a hard drive and software that was on a CD-ROM, I can clearly see, and this is probably the biggest hurdle for the technology to satisfy, is somehow the technology would have to make sure that the owner of that particular copy on CD-ROM when they transferred the hard copy off their hard drive, they did not retain any copy be it on their hard drive or on CD-ROM because that's what the first-sale doctrine right now requires.

Also the source copy obviously would have to be destroyed simultaneously as, I think, pretty much is inherent in the proposal itself. Finally the technological protection must ensure that any generational copy created from the source copy resides in no more than one medium at any time.

I think it is a further consideration because there's definitely a concern that somebody could play volleyball with certain works. For instance you can lend a book to somebody and then give it back but it's a heck of a lot easier to do in the data world.

You're not limited, as I mentioned before, to geography. You're not limited to the people you know and you can do it a lot easier. That is a certain concern. I think significant consideration ought to be given -- if you're considering changing 109 to account for this hypothetical technology -- a potential rental right for all works in digital form to prevent something like that from happening.

MR. SIMON: There's a corollary consideration to this beyond Professor Hollaar saying that you're never going to come up with that technology so so much for your hypothesis.

An important consideration in our industry, the software industry, is we will license a computer program to a small enterprise at a particular price. That small enterprise may then become acquired by a different kind of enterprise to whom we would sell that product at a different price. Let's say in this instance a higher price.

Other concerns for us is that because our licensing models work on pricing to the customer's needs, this notion of the distribution right -- sorry, the first-sale right somehow permitting all these transfers once somebody has acquired this copy and somehow eliminating the licensing restrictions that may be imposed on that copy is very troubling.

That is part of the issue that I think libraries have raised and others have raised in complaining about licensing restrictions. We think it's independent of the first-sale doctrine which exist in law which we accept.

We think that it's important for parties voluntarily to write licenses about what can and cannot be done with copies. They can dispose of them, transfer them, lend them. In fact, let's keep going south.

The copyright law already speaks in respect to digital medium with respect to some of those things, that you can restrict for computer programs some of those first-sale kind of concepts.

The point I'm making is whatever you chose to do -- we don't think you should do very much to 109 at all -- whatever you choose to do, it's important to ensure that private parties retain the right to write licenses as they see fit and as they freely agree to do so.

MR. KUPFERSCHMID: If I could just add to that, I want to make clear that I'm in full agreement with what Emery says. Even though I did not mention licenses themselves, clearly what I said does not mean that I want you to ignore or preempt the license. The license should still continue to have value and effect.

MR. FEDER: One more question for Dr. Hollaar. Are you aware of any evidence of any actual harm resulting from what you describe as this mismatch between Section 117 and the way system administrators actually backup network systems. Has anybody ever been found liable for any of those activities?

DR. HOLLAAR: Not that I know of. It is, of course, always out there. You can get a rogue content provider as we saw in the Netcom case where they have another agenda and they are stretching the limits.

Luckily the court in Netcom didn't find liability, but in a sense had to write law to do that, which the DMCA then picks up. It's always out there. It's always a problem. I think maybe it's more from my position as an educator that it is very hard to teach something that doesn't match reality.

If we are trying to get people to respect things and you present, "Here are the rules for copying," and the first thing that happens is a student in the classroom raises his hand and says, "What about the backups that the university does?" You say, "Well, those are not really allowed but we sort of overlook them." It's very hard to go through and teach that. And it has the potential of someone making the wrong decision.

It's the same thing with the temporary copies where the decision in MAI v. Peak, I think, is right on the money. The RAM copies are copies and it makes sense.

But then we get the difficulty when the No Electronic Theft Act was passed and it was conditioned on making so many copies having a total value on it. Did that mean that every time someone ran the program, the cash register went "cha ching" and we got closer to the $1,500 limit?

We have a statement on the floor from Senator Hatch saying that's not what Congress intended, but there is nothing in the NET Act that really says that's not what the law says.

It's very hard to teach such things. It's very hard to get respect for things where the moment

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they ask a sensible question you have to say, "Well, we sort of ignore that," or, "That doesn't fit." That's where the damage is.

MS. PETERS: Jeff.

MR. JOYNER: I only have one question for Mr. Kupferschmid. I hope I pronounced that correctly.

MR. KUPFERSCHMID: Yes. Perfect.

MR. JOYNER: And I will take you up on your offer later, but I'm asking you to explain how the fair-use doctrine might operate with respect to authorized playback of content, rebuffering, streaming, etc., and why did you believe this doctrine will provide more comfort to, I'll call that group, civil society than their proposed changes to Section 117?

MR. KUPFERSCHMID: Well, I can attempt to give you a very general answer but as anyone knows who has any experience with the fair use doctrine, it really is very highly dependent upon the facts of any given situation.

We've heard everything mentioned here from Section 108 to 301 to, I think, 110. For some reason fair use hasn't been mentioned as a possible solution, at least, to some of the concerns of some of those who are proposing amending Section 109 and 117.

I think that in many instances fair use will resolve their concerns. In the areas where it doesn't resolve their concerns, then it probably shouldn't. That means it drastically affects the interests of the copyright owner. That's the balancing act of the fair-use doctrine.

The danger of amending Section 109 or 117 in the ways that they propose, it's so broad it just swallows up and makes the fair-use doctrine irrelevant. You never get to the fair-use doctrine because the language is so broad it would allow acts well above and beyond what any of us would be considered to be reasonable.

MS. PETERS: Marla.

MS. POOR: I have a question for Emery.

You touched upon this somewhat in your comments when you talked about the disruption of business models and the commercialization of products. What is the real harm in temporary copies?

MR. SIMON: We write our licenses based on copyright base rights, the copyright base property interest that we own and the computer program. Those licenses then direct how the product may be used and what terms and conditions.

Now the question is what is the underlying right that is implicated. Lots of rights. Distribution right, but mostly rely on the reproduction right.

If you take the proposition that entire works must be reproduced in order for the reproduction right to come in effect, in a digital world where what we do is we copy portions of works as the processor processes them, it makes no sense. It has to be that something is commercially significant. Something with commercial value is being copied.

A portion of the entire work may be at issue. It doesn't have to be the whole thing. If somehow there is an exception created that says entire works must be copied for the reproduction right to be implicated, we can't write licenses but we have to redesign the way computers work to no longer do the efficient thing which is reproduce only those portions of huge programs which are needed by the processor, but to process everything simultaneously.

That makes absolutely no sense so it predisrupts the way our licensing factor works. To adjust for that problem we would have to redesign the way the machines work which makes no sense either.

You'll hear, I assume, a lot about this looking at the comments this afternoon about buffer copies, buffer copies, buffer copies. Buffer copies are RAM copies. It's just a portion of a work. There's nothing magical about a buffer copy. It's just that portion of the work which is next in line for the processor to deal with.

The notion of saying that buffer copies are exempted from the software industry's perspective is the same thing as saying RAM copies are exempted. It's the same thing as saying that unless you copy the entire work, you have no reproduction right liability.

If we go there, we have a huge problem because we don't design our products to copy all 2 million lines of code into memory at once. To do that you would need very different kinds of computers.

Some of our members would be very happy because you would buy a lot more memory and you would buy a lot more processing capability but it would not make for a very efficient or cost effective products.

MS. POOR: What about the piracy aspect to temporary copies?

MR. SIMON: A lot of the problem that we run into from a business software perspective is internal corporate copy where corporation will buy a license for 100 users and we'll have 500 users. There may only be one actual copy, full reproduction of that computer program that resides on the server.

Each of those now thousands of users will be only making copies of portions of that product and will only do so on a temporary basis in RAM as they are using it.

Unless we have a cause of action against those portions of copies being made, even on a temporary basis we have no reproduction right base cause of action to go against now all those people that have exceeded the licensed authorized use of the work.

MR. KUPFERSCHMID: I'd like to make a comment on that, though. I don't see that there isn't a way that a temporary copy provision, especially one that recognizes the reality of how computers process data, if properly drafted necessarily means that the horrors that Mr. Simon just presented have to occur.

You could write a terrible provision that would allow those loop holes but that doesn't mean that is the only way you have to write such a provision. Temporary copies exist.

For example, the thing he brings up on a limited license where someone has licensed 10 copies, or the simultaneous use of 10 copies. Because they are on a server and there's more than 10 people using it is a question of whether the person is a rightful user at that time.

It's not a thing about whether it's in RAM at the time. There may be ways to right a provision that matches reality much better than 117 currently does in its wording and yet doesn't release this tale of horrors that we are hearing about.

MR. SIMON: There are lots of ways to skin a cat. As I said, our licenses are based upon the copyright base rights. One of the panelists this morning talked about how there needs to be some federal law preempting certain kinds of licensing and the kinds of licensing they are talking about his limitations on the kinds of uses that can be made.

You know, Professor Hollaar, I agree with you. There's lots of ways to solve this problem. I don't think that the way to solve this problem is to create a larger exception to the reproduction right.

MS. PETERS: Okay.

MR. JOYNER: Let me follow up on Marla's first question and everyone else feel free to jump in. I think you made the case that at least in some cases many temporary copies will prejudice legitimate interest of the copyright owners. I understand your objection to a provision that might say temporary copies are okay. How about taking the language of the Boucher Campbell Bill which was much more limited. It's very short and I'll read it.

"Notwithstanding the provisions of Section 106 it is not an infringement to make a copy of a work in a digital format if such copy (1) is incidental to the operation of the device in the course of the use of a work otherwise lawful under this title, and (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interest of the author." What is the problem with that kind of a provision?

MR. SIMON: I think it's a null set.

MR. JOYNER: I beg your pardon?

MR. SIMON: I think it's a null set.

MR. JOYNER: You mean it doesn't exist?

MR. SIMON: I think that's a null set because I think what they are talking about -- again, I can speak to computer software. I can't speak to music or movies or the products, as I pointed out in my testimony.

When I take out of 2 million lines of code computer program and I am using a particular applette or subroutine of that, which is the only thing that I have now reproduced, it's the thing that I needed to perform the function that I want to perform. Clearly it has economic value to me.

The mere fact that I reproduced a portion of it, and provided that you have this test that it has to have economic value, it's always going to have economic value. That's why I think it's a null set.

The second problem there is you are taking us down a path of litigating what is diminimus economic value and somehow assigning the value of reproducing 100 lines of code out of 2 million, because that's what I happen to be using, in a way that says the total value of the work to me, how much is this, and is this like too trivial for us to take cognizance of it under law.

It takes us down a path that says diminimus economic value is not cognizable. That's a terrible place for us to be from a litigation perspective.

I think it's either a null set in which case any economic value satisfies, or the whole thing is swallowed up because unless you copy the entire work, the notion is going to be that these portions are going to have no separate economic value, in which case you are never going to have liability.

MR. MOSKOWITZ: Actually, I'm not sure

that I understand that is actually the case. I think that the language in the Boucher Campbell amendment is very reasonable with regards to copyright.

If you have 2 million lines of code and the issue of copyright is that you share in order to establish value, you certainly don't presuppose that the innovation has any economic value to any users by then saying, "Pay me first or don't allow access to these improvements that were made to the code for which we want feedback and we want to understand whether or not there is value."

You are basically saying just because I developed, that means that there has to be some sort of payment or restriction on access to those improvements.

MR. SIMON: That's a personal choice whether you choose to ask for payment or not.

MR. MOSKOWITZ: Not if you have --

MR. SIMON: But it's not a question for the copyright law to say you can't get paid.

MR. MOSKOWITZ: -- click through and agree to the limiting terms of some sort of new software application for which there was no fair use or any type of determination by some sort of teaser or anything else. Nor would it be for music or video where you do have teasers. You do have free access in the form of radio or television broadcasts.

I think the example of your ASP model is an exact example that speaks to that language which is basically allow the user to interact with the provider and make sure that the value is being added and as it's being added, you charge. If it's not being added, you don't charge but you don't presuppose that there is value just because someone says that no one should have access to is.

MR. SIMON: I'm sorry. I need to come back to the for-profit point that I started out with. Our companies are in business to make money.

MR. MOSKOWITZ: So are we.

MR. SIMON: So are you. Exactly.

MR. MOSKOWITZ: We are also in the business of assuring that users and librarians and others have access to works where they can determine that work has been serialized or otherwise tagged in such a manner that you know you are being paid for that work.

Not just to say just because I'm a developer I should be paid and I need to have a click-thru agreement that restricts anybody to have some sort of test or some sort of understanding whether the exploitation of work previous or in the future is appropriate to add value to that work.

MR. SIMON: I have no clear understanding what you mean by adding value and this is my point. Do you want us to ligitate this issue?

MR. CARSON: Well, let me focus on something else. You make a point about the second of the two conditions in that proposal having to do with essentially the economic value that is being used and whether there is any value.

How about the first provision? It must be incidental to the operation of a device in the course of a use of a work otherwise lawful under this title. Why doesn't that solve it?

MR. SIMON: The buried thing there is the otherwise lawful. I would much prefer a term that says authorized because that would say that I have now licensing terms and conditions that are enforceable and the law is enforceable.

The extent to which I have imposed through the license restrictions on what can and cannot be done are fully enforceable. The problem that we run into is that lawful term which sweeps in concepts as intended by Mr. Boucher of fair use which then are intended and interpreted as trumping those licensing terms and conditions. That's where we run into a problem.

MR. CARSON: As far as you are concerned, if we struck otherwise lawful and said authorized, you would be okay?

MR. SIMON: Much more comfortable.

MR. CARSON: I think the difficulty with striking that is that then you could have a license agreement saying, "We do not authorize you to do this."

MR. SIMON: That is what licensing agreements say.

MR. CARSON: But there are other things in the copyright law, because Congress has set a balance, has indicated certain things are acceptable. That is the difference between otherwise lawful and authorized.

DR. HOLLAAR: I think that language, and I would have to read it precisely, but it is a very good start. I think some of the things that are being pointed out that somehow it speaks to total copying and we may not be totally copying the work.

I don't see that in there. I don't see a judge saying, "No, this isn't a reproduction because you copied everything except the last byte of the program which is never used anyway." Judges are smarter than that.

In talking about whether this gets into a discussion of whether it's de minimus or not if, in fact, litigation were brought, the court is going to be in that discussion anyway because anyone is going to bring up as a defense of fair use.

They may not be authorized to do this under 117 but they will make a good argument that this was the reasonable expectation of their use of the program and it's going to be under fair use.

I'm very hesitant, and this brings back your fair use comment, to sluff things off on fair use because if 117 may be murky and subject to strange interpretation, fair use is even worse. We have now from an educational point of view a bunch of people who need a great deal of education on what fair use means.

I suspect that the majority of the people out there in the digital world, the high school students, the college students, the people like that, think that fair use is some magic term that if you mumble it and it seems right, then the copyright laws don't apply. We seem ample illustrations of that in the Napster case and so forth.

It's not the thing that you want to hang your hat on from an educational point of view. It's much better to tell people you can make the copies necessary to run your program because there is a specific provision that says you can make the copies necessary to run your program or to exploit a digital work as was intended.

When you say you can do that because it's a fair use, then there's no boundary on what they will assume a fair use is.

MR. KUPFERSCHMID: That's why we have 117 which is more definitive and more detailed on that issue, and which is more narrowly crafted than fair use certainly.

This language here -- "does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interest of the author" -- it's a heck of a lot broader than the fair-use doctrine. It is because the language is from international treaties and has got to be made that way so all the different countries can meet this standard.

The United States meets the standard through the four fair use factors that are used to determine when something conflicts with a normal exploitation and does not unreasonably prejudice legitimate interest of the author. Those four factors are what the United States looks to as to when this occurs. The proposed language would make these factors irrelevant.

Along with it all the case law that has developed under the fair-use doctrine would be gone, and we would be left to interpret this very, very, very broad language.

MS. POOR: I want to go back to something that Emery said, your desire for authorized versus lawful to sort of prevent the fair use coming in. How exactly does fair use come into play exactly? I can't get my hands around that exactly.

MR. SIMON: There's only been one principle area where fair use has been litigated in the software area and that's the issue of decompilation. The authorized issue is not exclusively a fair use issue. As I tried to point out to you, the authorized issue is an issue of the enforceability of licensing agreements which is critical to the software industry.

MR. CARSON: I have one more question directed primarily to Emery and Keith. Dr. Hollaar in his testimony described what I think is, in fact, a common and prudent practice of backing up everything on your hard drive. I think he's correct but I would like your reaction.

That practice, in fact, is not really something that a strict reading of 117 would permit. Do you agree that's the case and, if that is the case, do you agree that maybe there is a problem between the reality of what we would all agree, I assume, someone should be able to do and the reality of what the law says people can do?

MR. KUPFERSCHMID: He talked about several different items that he was backing up in software which I think would fall under 117. He mentioned data and I don't know exactly what he's talking about there but I think there is a question whether that information itself is protected by copyright.

That is certainly one thing to consider. Then you have to ask the further questions who owns it and is this something that he created. Does he own the copyright of the material that he's backing up. I'm not sure I heard everything.

MR. CARSON: Let's take a simple -- I download content all the time on the Internet. I'm authorized to do it. It's on my hard drive and I'm authorized to keep it on my hard drive.

If I'm prudent -- frankly I'm not but if

I were prudent, I would be backing that hard drive up every once in a while so that in case something happened when the hard drive crashed, I would be able to get that stuff back again because otherwise I would never have it.

In addition to backing up my software, I'm backing up that content that is copyrighted content of a number of copyright owners who have given me permission, at least implicitly, to have that on my hard drive. They have not presumably given me permission -- or maybe they have. I don't know. Maybe that's your argument -- to back it up on CD-ROM perhaps in the event of a crash.

Section 117 I don't think gave me permission to do that so I am strictly speaking of violating the law when I do that. (A) Do you agree that I'm violating the law and, (B) do you agree that I shouldn't be allowed to do that?

MR. KUPFERSCHMID: I don't necessarily agree that you are violating the law because, like I said before, you are not just dealing with 117 here. You do have to look at 107 which is this catch all.

The terms of 117 are quite specific and if it doesn't fall within that, then you have an opportunity under the fair use doctrine that you have to look at is this backup copy affecting the actual or potential market? How much is being copied? Look at all the four fair use factors.

MR. SIMON: I guess I disagree a little bit. Backup copying was proposed by CONTU for a specific reason which is machine scratch. To the extent that logic applies to things that you have the authority to have on your machine and to the extent you can figure out a way that backup copy is not going to be misused, abused, otherwise redistributed, performed, or other things. If you are doing it for a limited purpose because machines crash and protecting yourself, it's worth examining.

MR. MOSKOWITZ: And also the licenses that you specify in the click-thru licenses. Specifically in almost all cases for almost all software and hardware companies they restrict any liability whatsoever from the disappearance of data.

Essentially there's no warranty on any click-thru license on any software that I've ever purchased that has ever said if you accidentally lose this data, we're responsible for it.

MR. SIMON: Does your license contain such a provision?

MR. MOSKOWITZ: Absolutely not.

MS. POOR: To take the example of an Excel document, you open up the program, you insert some data into it, you save that, and then you backup that particular document. I mean, you would agree that's a data file. You back that up and then you come along later and you back up documents or you back up things over that or in addition to that?

DR. HOLLAAR: I'm talking about a different type of -- before I get to that let me make one point about license agreements. If you look at many software license agreements, it says that you have the right to make one backup.

It's a very common term. Again, if we say that license should trump copyright law, then the people who are having the file saves done are incredible infringers at that point.

Going back to your question, the type of backup I'm talking about is one that you don't realize because if it's done properly, it's done out of your sight. If things are being done right, the little backup elves come in during the night and they make a copy of it and they squirrel it away some place never to be seen again until there's a problem.

You may have done something on your spreadsheet and you made a backup because that was prudent. But there is someone watching out for you in case something goes wrong every night making backups either of the disk completely or anything that changed on the disk.

They are making that backup not necessarily based on whether it's a program or data but they are just copying every file in sight. If you install a new copy of WordPerfect, they make a backup copy of it at the time of installation because they say it's a new file.

They make a copy not only of the programs that got installed with WordPerfect, but also the clip art directory that got installed and the samples and the help files, none of which are computer programs.

Two problems. One is that there is no authorization for that. You can argue fair use, but then we get into the quagmire of what is fair use.

The other thing is that the other provision of 117 as it stands is that when you upgrade, when you are no longer the rightful possessor of a particular version of software, you have an affirmative obligation to go through and delete that.

There is no mechanism in the backup thing for doing that deletion. No one really cares. What I'm saying is simply that this isn't noticed in general but it conflicts with the provision and makes it very hard to get people to recognize what 117 really provides.

MS. PETERS: Because of the time I'm just going to ask one quick question. It's really to the software industry. With respect to software that's being sold today, or whatever you want to call it, made available today, you mentioned that 12 percent is made available online today and most of it is on CD-ROM.

My understanding, and I'm trying to verify it, is that most all software when made available is made available subject to a license as opposed to an outright sale.

MR. SIMON: Correct.

MS. PETERS: Correct.

MR. SIMON: Actually, I can't speak to software. I can speak to business software.

MS. PETERS: Business software.

MR. KUPFERSCHMID: I agree.

MS. PETERS: Okay. So it's all subject to a license. So, therefore, since it's all subject to a license and it's not an outright sale, the way it exist today for sale doesn't really apply and whether or not you can transfer a copy. The physical object that you got really is determined by the term that is in the license agreement.

MR. SIMON: That is a correct interpretation. Yes.

MS. PETERS: Okay. All right. Thank you very much. It was extremely helpful. We will resume this afternoon at 1:45 promptly and we would like the third panel to have seated themselves at that time. Thank you.

(Whereupon, at 12:34 p.m. off the record for lunch to reconvene at 1:45 p.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:51 p.m.)

MS. PETERS: Good afternoon. Welcome back to the second half of the hearing on Sections 109 and 117. We are now on Panel 3.

As was noted this morning, the audio system is picking up everything the witnesses and us are saying but it's not projecting the sound that is being said here back. People who can't hear, No. 1, can move up. That's one option. And I'm going to encourage us and the witnesses to speak a little bit louder.

Let's start with Panel 3. We have Susan Mann representing the National Music Publishers' Association. Marvin Berenson representing Broadcast Music, Inc. Gary Klein representing the Home Recording Rights Coalition. Pamela Horovitz representing the National Association of Recording Merchandisers. John Mitchell representing the Video Software Dealers Association. And, I guess, we'll start with the order that we have with Susan.

MS. MANN: Thank you, Marybeth. I have to apologize -- we talked about this a minute ago -- for screaming at members of the panel but it's for the benefit of people in the back of the room. Thank you for the opportunity to present testimony today.

NMPA is the principal trade association representing the interest of music publishers in the United States. The more than 600 music publisher members of NMPA along with their subsidiaries and affiliates own or administer the majority of U.S. copyrighted musical works.

NMPA's wholly owned subsidiary, the Harry Fox Agency, acts as licensing agent for more than 26,000 music publishers, businesses that in turn represent hundreds of thousands of song writers.

The Harry Fox Agency acts on behalf of its publisher principals in connection with licensing Internet distribution of music, as well as other more traditional uses of music in recordings, motion pictures, and other audiovisual productions.

NMPA and its members and HFA and its principals have a direct interest in the issues to be addressed in the agency's report, the operations of Section 109 and 117 in connection with new technologies and electronic commerce.

In the two years since the DMCA was enacted, electronic commerce has surged in some areas. The progress toward making music available to be downloaded or otherwise accessed online in a manner that assures that copyright owners are compensated has in some instances been slower than music copyright owners and some who would wish to enjoy music online would have hoped.

The music industry has faced challenges in reaching consensus on acceptable technological protection measures and in adopting compatible rights management systems. Considerable progress has been made but for delays and frustrations this has caused, the music industry bears some responsibility.

The larger impediment to the expansion of electronic commerce, however, has been the introduction of services that exploit music online without the authorization of the copyright owner or any attempt to compensate the copyright owner or the creator.

If the past two years have taught us anything, it has been that it is nearly impossible to build an e-commerce marketplace for music in competition with commercial entities that give music away or enable others to distribute music free.

We have learned that many consumers, millions of them in fact, will not even pay a reasonable license fee if they can obtain a copy of the same music for free.

Companies engaged in the licensed distribution or public performance of music have shared in this difficulty and frustration. In fact, one prominent member of the Digital Media Association testifying before Congress has emphasized that its business prospects have been dampened by unauthorized distribution of music.

The industry is working to deal with these challenges and recent developments have shown that the music industry can and will respond to new technologies and business models through commercial negotiations and innovative license terms.

Licenses issued to firms offering "cyberlocker" services will soon enable consumers legitimately to access a CD that she has purchased from her computer or on a variety of handheld devices.

At the same time, other consumers may find that their desires are best met by downloading. Others may continue to wish to purchase tangible copies online or from brick and mortar retailers. In sum, the digital marketplace is evolving and will continue to evolve in directions that we can predict today and in others that we cannot.

Some commentors, DiMA and NARM, for example, have singled out the availability of digital first-sale rights as somehow essential to the functioning of the e-commerce marketplace.

DiMA, in particular, has argued that the dramatic legislative expansion of Section 109 rejected by Congress in 1998 should somehow be made more palatable through the use of a supposed technology that purportedly, and I quote, "Can ensure that the particular digital copy is deleted or made permanently inaccessible from the transferrer's computer upon digitally transferring the data to the transferee."

DiMA and its allies have offered little support for the significant legislative change they desire and have failed to explain how widespread deployment of such technology -- even if available and reliable -- would benefit consumers, copyright owners or, for that matter, DiMA members.

While the music industry is keenly aware of consumer interest in cyberlocker services and Napster-style file propagation, we have heard no hue and cry, not even so much as a suggestion, that consumers are looking for products that will function under the forward-and-delete model DiMA advocates.

In fact, the high level of consumer interest in the file propagation technologies that the media calls "file sharing" would lead one to conclude that consumers would find such an approach unacceptable in both the marketplace and in the law.

The objective of the DiMA model appears to be to circumvent copyright rather than to meet any genuine consumer demand.

Advocates of self-cannibalizing copies claim that such technology when implemented in conjunction with digital rights management systems will decrease piracy risks. NMPA believes that effective technological protection measures and effective implementation of rights management systems will, as a general matter, reduce such risks. So will licensing agreements fair to copyright owners and creators, commercial distributors and consumers.

Over time, however, we believe what will best promote electronic commerce and the acceptance of new technologies is the flexibility to respond to consumer demand. For e-commerce to flourish the law should foster rather than dictate consumer choice.

For example, a consumer may choose a service that allows him to store music he purchases on a server remote access to download and receive authorization to make an additional specified number of copies from another service or to share music on yet another.

How would a digital first-sale doctrine policed by forward and delete technology serve the interest of consumers or copyright owners in these instances?

In NMPA's view there is nothing magic about forward and delete, even assuming that it can be reliably achieved, and certainly nothing to indicate that it should serve as the beacon for future e-commerce in our industry.

In recent hearings Congress has urged the music industry to help itself out of the piracy and public relations problems it is experiencing by moving forward with voluntary license agreements that enable consumers to experience music online in a variety of ways.

NMPA is hardpressed to see how accepting the recommendations of those advocating a so-called digital first-sale doctrine would advance this effort and promote e-commerce.

In our view, the extension of the first-sale doctrine beyond the distribution right to the rights of reproduction and virtually every other right in Section 106, rights which have never been implicated by first sale, stands to hinder rather than promote electronic commerce.

In carrying through Congress' mandate to assess the impact of new technologies on the operation of Section 109, NMPA urges the Copyright Office and NTIA to consider the disruptive and potentially harmful impact that the legislative expansion advocated by some commentors would have on the ongoing efforts of music and other copyright owners to curb widespread piracy through file propagation services and software, and to deal in constructive commercial terms with the next online distribution technology whatever that may be.

The impossibility of enforcing a mandate to delete one's own copy of a protected work when a copy of that work is forwarded to another would be sure to cause many consumers and some commercial users of works -- some of whom already believe, or at least claim to believe, that consumers have a right to copy protected works -- to believe, or claim to believe, that consumers have a right to distribute those works to the public as well. The sought after legislative change would not, in our view, clarify the law but would confuse it.

Turning briefly to the issue of temporary and archival copying that some commentors have raised in connection with 117, the incidental copy amendment advocated by some commentors would not promote the growth of electronic commerce.

Rather, it would expand the scope of Section 117 of the Copyright Act and diminish dramatically the scope of the reproduction right in music and all other copyrighted works.

As the Copyright Associations' joint comments discussed in some detail, the suggestion put forward by groups seeking to expand Section 117 limitation on reproduction rights in computer programs was first put forward during Congress' consideration of the DMCA and rejected.

Instead, Congress in Title 3 of the DMCA added a new Section 117(c) that spells out the specific and limited circumstances under which the reproduction of the computer program in memory for the purpose of computer maintenance or repair is not an infringement.

In continuing to press for this failed amendment, advocates seeking to expand Section 117 largely ignore the DMCA amendment and Congress's clear intent to approach the temporary copy issue with considerable caution.

As the Joint Copyright Association comments made clear, digital temporary copies are becoming an increasingly important means through which copyrighted works are, and will be, made available to the public. Access to works via the Internet or through the use of network-ready devices that enable consumers to use works temporarily exemplify this trend.

At the same time, some forms of piracy consist of little more than making temporary copies available without authorization to members of the public.

Thus, the continued recognition of temporary copies as reproductions under U.S. and international copyright law is crucial both to the development of electronic commerce and the ability to enforce rights in certain circumstances.

Thank you.

MS. PETERS: Thank you.

Marvin.

MR. BERENSON: Good afternoon. I want to thank the panel for giving me the opportunity to testify today.

My name is Marvin Berenson. I'm Senior Vice President, General Counsel of Broadcast Music, Inc., known as BMI. BMI licenses the public performing rights in approximately 4.5 million musical works on behalf of its 250,000 affiliated songwriters, composers, and music publishers, as well as thousands of foreign works through BMI's affiliation agreements with over 60 foreign performing right organizations.

BMI's repertoire is licensed for use in connection with performances by over 1,000 Internet websites, as well as by broadcast and cable television, radio, concerts, restaurants, stores, background music services, sporting events, trade shows, corporations; basically wherever music is publicly performed.

The first-sale doctrine in Section 109 of the Copyright Act permits the owner of a copyrighted work like a CD to redistribute that property without violating the exclusive rights set forth in Section 106(3) of the Act.

Digital transmissions on the Internet for downloading music are different from distributions of physical media because they implicate several copyright rights including the public performing right, the public display right, the reproduction right in addition to the distribution right.

Digital transmissions by downloading invariably result in a reproduction; that is, a copy retained by the recipient. Moreover, the Internet permits multiple copies to be sent simultaneously by the sender to different recipients.

Applying the first-sale doctrine to digital transmissions involving downloads would violate the reproduction right which is not covered by the first-sale doctrine.

The first-sale doctrine should not be applied to digital transmissions because doing so could also adversely impact the public performing right in musical works. Digital transmissions on the Internet constitute public performances of the underlying musical work under Section 106(4) of the Act when made to the public.

For example, when Napster enables users to make their music collections available to the public for downloading without authorization from the copyright owners, the copyright owners' public performance right in those songs is implicated.

The first-sale doctrine does not apply to the public performing right. Such transmissions require authorizations which normally take the form of public performing rights licenses granted by BMI, ASCAP, and SESAC.

It should be noted that BMI issued the first commercial Internet copyright license for music in April of 1995. Since then BMI's licensing has covered both downloading and streaming activities, as I said, for over 1,000 licensed websites.

DiMA and the HRRC are seeking an exemption that would enable not one truck but rather a fleet of trucks to drive through. They base their arguments on the fear that e-commerce in music will be stunted unless the first-sale limitation applies to digital distributions.

However, there is little evidence to support this claim. In fact, in the fast five years there has been a continued explosion in transmissions of music on the Internet. The Internet is literally awash with transmissions of unauthorized, unlicensed music in the form of digital MP3 files.

According to Napster, there are as many as 10,000 files transmitted per second on the Napster network. Yet, even in the face of this rampant piracy, digital downloads are expected to result in a $1.5 billion commercial market by the year 2005. In view of this, it is hard to make a factual case that Section 109 is inhibiting digital transmissions.

DiMA claims that new digital rights management tools will soon enable copyright owners to transmit secure, encrypted files that will protect against unauthorized multiple copying by consumers.

DRM, digital rights management tools, are in the developmental stage and are not yet in widespread use in the marketplace. Moreover, when owners do implement encryption tools, they are suspectable to being hacked.

I don't know if any of you have seen, and I don't know whether this is true or not, but allegedly in the SDMI they have situations where those encryption tools or the secure tools that have supposedly been developed, it has been claimed that they have been hacked already.

Recent experience has shown that licensing is the best solution to deal with unauthorized transmissions of music on the Internet. MP3.com has negotiated agreements for public performing rights, mechanical rights, and sound recording rights. Napster itself has reached an agreement with a major record label and has approached BMI and music publishers about licensing.

Looking at this developing market shows there is a strong demand for music online. It is not yet known, however, which of the several business models will emerge as commercially viable. In these circumstances, it seems premature to consider enacting a new copyright exemption that would affect online music delivery at this time.

It is important in this environment for the Copyright Office and the NTIA to send a strong signal to the Internet community that copyright law is still alive and well and applies to e-commerce transmissions. Indeed, the Berne Convention and the WIPO Copyright Treaty require that the marketplace for new uses of copyrighted works have the opportunity to develop. These treaties prohibit limitations on copyright that interfere with copyright owners' legitimate business opportunities. Accordingly, the proposal to extend Section 109 to digital transmissions should be rejected.

Now, again, I just want to spend a little bit of time on the Section 117 issue. DiMA's second proposed amendment to Section 117 of the Copyright Act involves exempting the reproduction right and streaming media where a portion of the material is captured in a temporary buffer at the user's computer.

BMI agrees with the joint copyright owner's comments that no change to Section 117 is warranted at this time. Section 117 is a limited exemption aimed at computer software that has nothing to do with broadcasting or music.

There is no indication in Section 104 of the DMCA that Congress intended that this inquiry should involve music broadcasting related issues on the Internet.

In view of the growth of webcasting since 1998, it is difficult to see how a brand new exemption is necessary to foster webcasting over the next several years.

Now, DiMA went well beyond the scope of this inquiry by suggesting that 110(7) of the Act be amended to apply to online music stores. The Copyright Office and the NTIA should not consider this proposal for a new exemption to the public performing right in this proceeding.

BMI contends that this issue is not properly before this panel and is not contemplated by Section 104 of the DMCA. BMI, through its written statement, has made its position clear on this point.

Basically I want to finish with one overall comment, and that is basically there is no question and everyone has agreed that we have entered into the era of globalization.

One transmission here could go all over the world. Consequently, as a result of this, BMI has entered into agreements with its sister performing rights organizations for the global licensing of performing rights.

Since transmissions over the Internet are global in nature, whatever we do here in the United States will have an effect on the rest of the world, and obviously on the agreements that we entered into with our sister performing rights organizations.

The U.S. should not become a haven for entities that want to avoid copyright liability. The U.S. should not become the lowest common denominator with respect to the protection of intellectual property.

Thank you.

MS. PETERS: Thank you.

MR. KLEIN: My name is Gary Klein. I'm here on behalf of the Home Recording Rights Coalition, a coalition of consumers, manufacturers, and retailers whose purpose is to protect and promote fair use rights.

I'm also the Vice President of the Consumer Electronics Association, a 650 member association of the manufacturers of the products that deliver content to the ultimate consumer.

First, let me just state the Home

Recording Rights' Coalition position. Put very simply, the first-sale doctrine should be clarified so that it does, in fact, include digital transmissions. The law needs to be crystal clear in order to eliminate any uncertainty and, we think, generate the growth of new products.

Let's understand the underpinnings, first of all, of the first-sale doctrine. It was not, as one of the comments I read seemed to suggest, adopted for the benefit of copyright owners.

It was, in fact, based on a simple economic principle and that is to limit the restrictions on the alienation of property lawfully acquired. You buy something, you own it: you therefore have the right to deal with it as you will. Sell it, give it away, donate it.

There's no compelling reason why the same principle should not be applied to digital. Quite simply, you've bought it, you paid for it. You've heard some of the objections and I'll deal with those in a minute.

The Boucher-Campbell Bill, HR 3048, recognized this principle and proposed language that would serve as a model for this proceeding, and we urge you to look at that and essentially consider adopting that. It was not, in fact, rejected by Congress. It was simply never considered by Congress.

If you simply take the fact that it never passed, well, the first copyright law was never passed and was never considered either, so if that's your criterion, then there would be no copyright laws.

Now, once you understand the basic underpinnings of the first-sale doctrine, then it seems to me that the burden ought to be on the content industry to come forward and establish clear and convincing reasons why it shouldn't extend to digital.

In reality, I believe, especially some of the arguments I just heard basically boil down to do we want a pay or play world or, as I said once before, take the "L" out of the "play" button and make it the "pay" button?

You've heard that the technology doesn't exist to protect digital transmissions. Well, I believe that is simply not true and you'll probably hear from other people who are a lot more technologically sophisticated than I am to explain that the technology for transmitting and then destroying the original copy does, in fact, exist. That coupled with digital right management systems, we believe, will ultimately decrease piracy risks.

Now, about piracy. It's a word that we feel has been much abused recently. Pirates, as we all knew when we were kids, steal. Unfortunately, it is now applied to anyone who happens to make a copy for which they did not necessarily pay and who are now thought to be stealing.

We disagree that every copy made that was not necessarily paid for is piracy. Consumers are allowed to record at home for noncommercial purposes.

In fact, the first-sale doctrine coupled with the Sony Betamax case created an unanticipated boom for Hollywood, which now makes more revenue out of video sale rentals than they do from the box office.

Once again, we believe that the new technologies will enhance protection for copyright owners while, in fact, guaranteeing consumers' possessive rights.

One other thing to point out. Nothing in our proposal in extending the first-sale doctrine to digital would infringe upon a copyright owners right to employ self-help techniques for protecting their works.

In other words, a copyright owner can allow someone to download copy but, nevertheless, make it impossible to forward that copy to anyone unless the original is destroyed. (Now, how would consumers react to that if that, in fact, is spelled out before you download?)

Hopefully the FTC would say, "You better make this clear. You will be able to download this but if you try to make a copy or transfer this to anybody, it will destroy your original." That can be done.

Now, we've heard about hacking and about SDMI, but the SDMI technology that was allegedly hacked was, in fact, not encryption. It was a watermark status identification technology which is certainly not the same thing as encryption or in the same context. And, in fact, SDMI has concluded that apparently two of the proposals were not successfully hacked.

So in conclusion to the 109 arguments, I would just like to say the doctrine has worked in analog. It has provided a larger distribution marketplace for content owners. It has been a tremendous boon to Hollywood. We believe it will generate the growth of new products and new revenue for copyright owners.

Now, just on Section 117, again, the HRRC's position is that 117 should be clarified to expressly permit certain temporary and archival copying of digital works. Consumers certainly should be able to make a backup or archival copy of content lawfully acquired through digital downloading.

It will protect against the loss of files through accidental deletion, through crashes, or through viruses which, we all know and have seen, can destroy files in hard drives. Consumers also upgrade quite a bit and they ought to be able to have the right to make a copy to an upgraded hard drive or an upgraded computer.

As for temporary copies, this is something I conceptually do not understand the objection to. First of all, we do not necessarily believe that this constitutes an infringement but we really believe, because of what I've just heard, the law really needs to clarify this point. The Copyright Office, in fact, has recognized buffering in its distance education study and we can see no valid reason not to extend it.

There will be new products. For example, high definition television and the transition to HDTV, which is a primary congressional objective, in order to get the analog spectrum back so that it can be auctioned.

HDTV will, in fact, rely on buffering and caching in order to deliver content and to provide interactive experiences. In fact, more devices that make ephemeral copies will undoubtedly come to market in the next year, including a variety of handheld devices such as portable organizers, cellular phones, and even wrist watches.

In this environment recorded digital media are in the same position as software was in the '70s and, like computer software, at least some portion of these media need to be temporarily copied into RAM in order to be performed.

Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of, again, "piracy." Ephemeral copies made in the course of viewing and lawfully gaining access to a work also have nothing to do with piracy and the law should make this clear distinction.

Thank you.

MS. PETERS: Thank you.

Ms. Horovitz.

MS. HOROVITZ: First of all, thank you for accepting my request to testify. I'm happy to be here with all of you.

I'm Pamela Horovitz. I'm President of the

National Association of Recording Merchandisers. Our 1,000 member companies are composed of the retailers and wholesalers and distributors of prerecorded music.

MS. PETERS: Could you speak up a little bit?

MS. HOROVITZ: Okay. We are a group, actually, that somehow frequently gets off the list of the stakeholders of those folks who have an interest in the outcomes of development of the digital marketplace. We are actually there every day quietly selling all of this music and video and entertainment.

Each day music retailers must balance the interest of copyright holders and consumers in the operation of their businesses. We are mindful of the fact that our businesses are also dependent on a firm protection of copyright. Every sale that a content provider loses is one we lose as well.

We are also mindful of the fact that without the consumer, music will exist as art but it doesn't exist as commerce. Our members are already eagerly embracing the Internet and e-commerce's music.

Over 80 percent of my members already have websites through which music consumers can purchase music including lawful digital downloads, authorized digital downloads, which have been made available commercially by content providers. So we are right in the thick of all the stuff that's going on right now, how's it going to work.

Retailers really are on the front lines of public reaction to any new product and service. Already our members know that consumers have serious concerns about digital downloads of music as relates to their privacy (something we've heard about more than once today). They have concerns about download complexity (we are a long way from plug and play). And about product reliability and about product returnability (something you can do with this if it doesn't work).

Retailers have traditionally added value to the marketplace by offering consumers different combinations of selection, of convenience, of price, of ambience, of service, and information. Even if this CD is the same thing everywhere you go to buy it, all of the rest of those things are different depending on how the retailer niches themself in the marketplace.

I am here today to argue that the first-sale doctrine is critical to allowing retailers the ability to differentiate themselves in a digital marketplace and that protecting retail competition and consumer choice does not equal encouraging piracy.

NARM members are not seeking to expand Section 109. We seek only to continue to honor the rights that retailers and consumers now enjoy with pre-recorded CDs and tapes in this newest configuration of music, the digital download.

I'm not a lawyer (but I'll guess you're hearing plenty from a lot of lawyers today). I think what I would really like to use my time with you here today pointing out really (and I think you even asked for this, Marybeth) some of the practical implications of where does this all lead, at least in the view of the retailers.

We heard some say this morning that "Section 109 is alive and well on the Internet" and that "retail concerns are speculative." I think they are wrong, so I would like to cite some examples that provide what I believe is some evidence to the contrary.

The first thing that I would like to do is to share some language from an eight-page End-User License Agreement for digital downloads. It is an agreement that is now out in the marketplace and it is being offered by a major record company. I have a copy of the full document if you would like to see the whole thing. [See appendix.]

This company, Company X, "Grants you a limited nonexclusive, nontransferable, nonsublicensable right to use the software" (no longer music) "as such software has been delivered to you."

That means don't make your own collection of favorite tracks on a single computer. To my way of thinking, that does mean "forget upgrading your laptop and taking the music with you. Too bad if your laptop dies."

This company will let you download the content to an SDMI compliant portable device but, "You may not burn this content onto a CD, DVD, flash memory, or any other storage device." There's more. It was eight pages remember. I'm not going to read all of them.

You may not print the photographic image, the lyrics, or other nonmusic elements. Imagine Mom listening to her kid playing a downloaded piece of music and wondering about these lyrics that she can't quite understand. She is not supposed to print those lyrics out. No. 1, she's not the original person so it can't really be transferred to her.

You see where I'm going with this. She can't even print out the cover to see if it carries the parental advisory. Neither could her kid even if he's been told or she's been told, "You can only buy stuff that doesn't carry the parental advisory."

You should, (I think, in my reading of some of this) forget about moving your music to your shore house computer for the summer because, "You may not transfer or copy this content to another computer even if both are owned by you."

In fact, in my reading, the whole definition of a family computer becomes very problematic under this license since you can't "transfer your rights to another at death, in divorce, or in bankruptcy." Even buying the kids their own computer doesn't solve the problem since they might take it to college, they might loan it to their roommate and, in case you missed the death provision, it's in there twice.

I think this morning's comment about "you can't donate your collection of music to the library" is expressly prohibited by this EULA.

I should also mention that this company "may from time to time amend, modify, or supplement this license agreement," but it's your job as the music purchaser to check onto their website regularly to find out about these revisions and they just assume that if you don't do that, you agree to them.

By the way, this software -- and this part is in bold caps in the EULA -- is being sold "as is without warranty including but not limited to implied warranties of merchantability."

Now, you don't get to see this EULA until after you have laid down your money. And that brings me to my second example. I think everyone needs to really be aware of the language from this same company's affiliate agreement which is the agreement that all retailers have to sign if they want to sell this company's downloads.

Under the affiliate agreement Company X will "have the right to collect and use the consumer data related to sales from the affiliate site." Elsewhere we are told that is going to include your e-mail address, what you bought, and when, and how much you paid for it even though elsewhere it says Company X is going to set the price for all retailers everywhere (I guess they just want to make sure you don't change the price).

They also "reserve the right to provide to parties related to them," -- whatever that means -- "aggregate sales information." I think it's reasonable to expect that some retailers may not want to share the identity of their customers with their suppliers. Or that consumers may want a choice in the marketplace as to how much of their identity they give up in return for being allowed to get access to music.

I think retailers may not want to share this information with competing retailers that those suppliers might happen to own an interest in. I think we can't exclude from this discussion the information that more and more record companies are selling direct online and are bypassing retail.

I think some retailers are going to want to post this EULA on the website before the customer puts his money down. This affiliate agreement is very specific about how and where you can post the information about the products they are going to let you merchandise.

Lastly, of course, maybe the retailers would like to determine what the price is themselves because maybe they would like to have storewide sales. Maybe they would like to continue to have sales on all their classical music.

Maybe they would like to run "two-for" sales. Maybe they would like to do all of the things that distinguish them in the marketplace now even in the online environment for an online consumer.

Maybe people would like to still give music as a gift even if the gift is a digital download. We are hitting the holiday season. I think that is on a lot of retailer's minds at this very moment.

Finally, I want to make one point real clear, and that is that this rapid trend toward copyright owner control of all levels of distribution and even post-sale consumer use is not limited to digitally distributed music.

Companies have already begun to try and eliminate Section 109 rights for tangible CDs as well. For example, this CD: The Writing is on the Wall by Destiny's Child. It's a must-carry CD for retailers right now. It's very hot given the group's popularity.

If you buy this CD at your local record store, it will play in any CD player and it will play in your PC, albeit with an invitation to shop directly next time at the record company's online store. Kind of like putting up a poster for your competition in your own store.

What you may never know is that the record company, Sony Music in this particular case, purports to bind you to an end-user license agreement that you will never even see unless you go looking for it in the "readme" text file.

That EULA states that, "By using and installing this disk, you hereby agree to be bound by the terms of this agreement." And, "If you do not agree with this licensing agreement, please return the CD in its original packaging with register receipt within seven days from the time of purchase to Sony Music Entertainment." This isn't just about the digital online world. This is about CDs as well.

This EULA states that you may use it on a single computer and you may not transfer it to another person even though Section 109 says you can.

Here's what concerns us. We understand that content providers, that copyright holders, are very nervous about Napster and about widespread digital distribution leading to their demise.

But we, I think, have some equally serious concerns about the business models that are being put into play eliminating retail competition from the marketplace. It feels to us that apparently content providers aren't happy with the rights that they already have in copyright law: the right of public performance (which we totally support); the right of reproduction (which we totally support); and the right of distribution (which we totally support).

But they are using licensing language to create and to protect a business model that is really designed to use retailers until such time as they can get to the consumers directly and then eliminate retailers from the digital equation. We just don't think that is good for anybody, particularly the consumer but not even the copyright holder really.

While we fully support protecting copyright, we think that copy right law needs to stop at the point that it simply becomes a sword designed to void Section 109 rights, reduce or protect anticompetitive conduct.

Thank you.

MS. PETERS: Thank you very much.

Mr. Mitchell.

MR. MITCHELL: Thank you. Good afternoon. I want to thank you on behalf of the VSDA for accepting our request to be here today. My name is John Mitchell and I am Counsel for Video Software Dealer's Association. I'm with the law firm of Seyfarth Shaw.

I also want to thank you for accommodating our last minute request for this switch due to Mr.

Andersen's health which we hope is just a minor problem. He is unable to exercise, I guess, his performance right due to maybe some viral technological protection measure.

VSDA, Video Software Dealer's Association, is the national trade association for the home video industry. Essentially the home video retail counterpart to NARM.

Our member companies are engaged in retailing and distribution of home video products in practically every neighborhood in the nation, these include primarily audiovisual works in the form of motion pictures as well as computer interactive games.

I would like to first begin by saying VSDA does echo NARM's concerns. We have perhaps enjoyed somewhat of a reprieve given that bandwidth and storage capacity has not permitted the same kinds of behavior to be as widespread in the movie industry as they are in the music industry. But we are concerned that we are seeing the direction this is heading and definitely do not want to see that pattern mimicked in the audiovisual work area.

But if you permit me a brief historical retrospective and a bit of a mixed metaphor, if we ignore history, we should be expected to be fooled again and again. If we look back to the early days of the next to the last technological breakthrough in packaged home video entertainment, the venerable VCR, we may recall that then we were warned by some extravagant hyperbole that, "The VCR is to the American film producer and the American public what the Boston Strangler is to the woman at home alone."

Video retailers back then were seen as opportunists and perhaps even as copyright thieves and not as entrepreneurs. They were not seen as entrepreneurs who based their concept of bringing economical motion picture entertainment into the home on a cardinal American legal concept that perpetual restrictions on alienability do not fit in the American scheme.

It bears repeating that these entrepreneurs, supported by an important American legal tradition, built the most robust economic distribution system for motion pictures ever. It's one which has greatly enriched the rights holders and enriched consumers with access to these creative works.

We have heard several objections already to the expansion of Section 109 or the first-sale rights or the creation of new first-sale rights. Our position is really to start with the reality we are looking at. We object to the contraction of Section 109 and the loss of existing first-sale rights.

Let me turn first to points we have in common. In today's controversies we can start with points in which the right holders actually agree with the retailers and we with them. I think this is a fairly uniform agreement.

First, we agree that Section 109 provides rights to purchasers only with respect to "copies lawfully made under the copyright act." Second, we agree that these rights apply to tangible copies in the sense that they apply to fixations which are, in fact, palpable. Third, they apply only when the transferrer does not retain a copy unless it is lawful for the transferrer to do so.

We also agree that, "A copy in a digital format is entitled to the rights and privileges in Section 109 just like any other physical copy." That is quoting from one of the content providers.

And it bears emphasis here that the House report on Section 109, actually Section 27 of the 1909 Act, the House Committee on Patents opined that, "It would be most unwise to permit the copyright proprietor to exercise any control whatever over the article after the proprietor has made the first sale."

We agree that the first-sale doctrine was established in part to prevent the use of the Copyright Act as a price-fixing tool. I would like to spend a moment on that point because it also relates to another well-established American legal tradition embodied in the first-sale doctrine which relates to antitrust law.

It would be illegal for suppliers, the copyright owners, to require that all retailers have the same price. It would also be illegal to require them to have the same uniform noncompetitive return policies, the same warranties, the same privacy policies, other terms and conditions of sale and level of customer service.

We have to begin by recognizing that retailers are expected to and ought to compete on these terms as well as on price. Thus, it is unlawful for a supplier to add license restrictions which force retailers to offer digitally downloaded copies at a fixed price even when that fixed price is the same at which the supplier may offer the copy directly to consumers.

There was testimony this morning from the Business Software Alliance indicating that they would like to give authors and copyright owners the right to choose the best distribution model of the best business model for distribution.

But it bears emphasis that there is no exclusive right of selecting your preferred business model under Section 106. The very purpose, in fact, of Section 109 is to see to it that they never have the power to control redistribution of lawfully made copies.

Finally, we do not contend that Section 109 rights may be used to increase the number of lawfully made copies beyond those for which the rights holders have received compensation.

Particularly with respect to audiovisual works we do not contend that the first-sale doctrine creates a right to make a single additional nontemporary copy even if some may be permitted by fair-use doctrines or other legal provisions.

On the flip side we contend that the reproduction right must not be used to destroy the first-sale rights to rent and sell copies lawfully made even if the digital distribution process involves some element of copying.

There's been a lot of use of the word "transmission" of a copy. It's interesting, I think, to note that the Copyright Act doesn't really give a helpful definition of the word "transmit" in this context.

Perhaps the real focal point isn't whether someone is transmitting a work because there is not really a right of transmission under Section 106 either. The question may be whether the transmission is pursuant to a public performance or whether the transmission is pursuant to a reproduction.

In effect, in the digital downloading process all we really have is copyright owners who instead of sending the order, perhaps digitally transmitted to the factory to press thousands of copies, or sending the order to a kiosk in a record store, have permitted a process in which you send the order to make a single copy on a home PC using essentially the consumer's manufacturing facility, the consumer's own quality control systems.

If the copy doesn't work, perhaps it's unclear who deals with the quality of that particular reproduction.

Where we emphatically disagree with rights holders is concerning their growing use and elevation of licenses, especially end-user license agreements. It is, of course, appropriate for license holders to license rights that they have, licenses that are provided under copyright.

We don't have any disagreement with the licensing of a right to make a copy, a licensing of the reproduction right. We don't have any concern with granting the right to distribute and they have done that for years.

We also have no concerns with the right to license a public performance. Once a copy is lawfully owned by another, we contend that there is no intellectual or other property right in those copies in the copyright owner.

A copy is personal property, not intellectual property. The copyright act contains no "use" right in Section 106 and there is no basis upon which a copyright owner can license what they don't have -- a license to control the usage or grant certain usage rights which they essentially have not had any right over to begin with.

It essentially really becomes a situation of a copyright owner granting one right they have, not in exchange for a cash payment, but perhaps in exchange for a cash payment and a relinquishment or waiver of rights that the consumer would normally have under law. "I will let you have the reproduction. I will let you keep your copy provided that you agree to waive your Section 109 or even fair-use rights."

Retailers are particularly concerned about the rights holder's reliance in their comments on the case of Adobe Systems v. One-Stop Micro. The court in Adobe was simply wrong in holding, in essence, that an end-user license agreement can eliminate the first-sale rights and that every owner in the chain of distribution from the copyright owner to the ultimate consumer also loses their first-sale rights simply because the supplier created an end-user license agreement like those we've seen here and affixed it to that particular -- either digital download or physical -- copy.

The Business Software Alliance has indicated, I think quite tellingly, that they claim not to sell software but only to license the software. If that is the case, then logically if they haven't sold it and they still own it, the first-sale doctrine never applies, which begs the question why are they here?

Why they are here is because I think they do recognize that, in fact, they do sell it. They sell the tangible medium. They have not sold their intellectual property rights, and perhaps there are some licensing issues involved there, particularly since business software often involves changing that very copyrighted work in the process of using that software.

There is room to license what kinds of creative uses one might make that would actually change the software. But the simple reason that they have sold the software is they have sold the tangible medium.

It is a single payment. It's unlimited in terms of time. There is no right for them to ask for the return of the disk on which it was distributed and is essentially a consumer good.

It is a sale, and the copyright owner cannot simply convert the sale of a tangible medium that contains a copy, or that is a copy, because of the contents, convert it into a license simply by saying that it is so, particularly not in a nonnegotiable, "You're stuck with it, we hid it somewhere where you won't see it until it's too late to do anything about it."

The implication from rights holders' reliance on Adobe here is the assertion that they may impose upon retailers licensing agreements which restrict or prohibit the rental of audiovisual works or limit the use to a single viewing, or perhaps even require registration at the supplier's website in order to obtain the authorization to engage in subsequent use.

Section 109 makes it patently clear that rental of a lawfully owned copy of an audiovisual work is lawful even if it is completely against the will of the copyright owner.

VSDA supported litigation to stop the circumvention of CSS copy protection systems. We support the use of laws and technology to prevent unlawful copying, but we do not support the use of technology to prevent the "unauthorized but perfectly lawful use."

Where the use is one of right, as in the case of Section 109, a right of the owner, not an exception or a defense to an infringement action, we vehemently oppose the use of technology to circumvent that right.

VSDA does not assert that the DMCA must be reopened or revised so long as the basis for a recommendation against change is that the first-sale doctrine and Section 109 apply with full force to copies lawfully made through digital distribution.

If, however, copyright owners insist upon using their congressionally granted copyright monopolies as leverage to restrict competition among distributors and retailers, to avoid Section 109, and to capture the identities of all the owners or users of lawfully made copies, VSDA will be front and center in support of any legislation necessary to prevent those kinds of abuses.

Thank you very much.

MS. PETERS: Thank you.

I'll start the questioning at the other end. Marla, do you have a question?

MS. POOR: No.

MS. PETERS: Okay. How about Jesse. While you're thinking of a question, Marvin, my understanding of what you're adding to the issue of the reproduction right is the performance right, that if I basically have "purchased a digital download" and somehow this Boucher legislation were enacted and I were going to basically forward and destroy, it's not just the reproduction right that's implicated but because I'm basically transmitting that work to a member of the public, it's also the public performance right.

MR. BERENSON: Our contention is that

download or not, if there's a transmission, the public performance right is implicated along with other rights.

It would be my concern that if one were to somehow interpret Section 109, or basically change Section 109, to eliminate this right with respect to digital transmissions, then somehow the public performing right would be implicated by that.

We maintain that it should not be but we don't want any interpretation in any way, shape, or form that it would be. That is basically our position.

To answer your question directly, basically "yes." Using the example that John gave before, if you buy that CD, in whatever form it takes, you say you have the right to do whatever you want with it. Well, not really. You cannot take that CD, or whatever form it takes, and perform it in a restaurant. That is a different right that is implicated. You don't get all the rights with the purchase. Okay?

Again, all I'm saying is from BMI's perspective of this is we don't want any interpretation of Section 109 to say if there is any change, and we don't think there should be a change, that the public performing right would be implicated in such a change. That's all.

Again, we share basically the comments of the copyright owners who say there is no need for a change right now. I think it would be harmful. I think there's a big difference when one is taking a single copy, a tangible copy, and saying, "Susan, I'm going to give this as a gift to you." Or, "Susan, you want to buy this?" Someone sitting at a computer clicks and one million or a thousand copies go zipping right out. I mean, there's a big distinction that is made between e-commerce and hard copies.

MS. PETERS: But back it up. Take the Boucher bill and basically you are going to have to erase. Let's assume that no matter what there is technology that basically says only one goes forward and as it goes forward, it wipes out what's on your computer.

You are still arguing, though, that in doing this the performance right is implicated. In other words, it's diminished in some way.

MR. BERENSON: Yes, if that would be permitted. In other words, if that transmission would be exempt from performing rights, yes, it certainly would have an adverse effect.

MR. CARSON: Explain to us how that transmission constitutes a public performance.

MR. BERENSON: Okay. This is step by step. Okay? I'll try. When you look at the copyright law itself, you have the definition of what a "performance" is: in other words, a performance to the public, not the normal circle of family and friends.

Then you have a "transmission." When you look at the definition of transmit, basically the Copyright Act provides that to transmit a performance is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

Once you have this transmission, that includes a public performance, if it is to the public, if it is not truly a private transmission -- such as if I send Susan an e-mail, that's a private transmission. If I could give it to anyone, if I could sell it, there's a commercial aspect to it and it becomes public in and of itself.

I'll just take it one step further, if I may, with respect to the WIPO copyright treaty. The mere making it available constitutes a communication to the public. When the United States basically altered or modified its copyright law so it could adhere to the WIPO copyright treaty, we said our laws are in conformity.

Well, the communication to the public right equals, in our mind, a public performance right. The mere making it available to someone constitutes a public performance - a communication to the public -- whether it's pull technology or push technology. If it's there, the WCT says it is made available and that equals communication to the public. I don't know if I've helped you in this or not.

MR. CARSON: So I may download the file from some website but I may never actually play it and hear it. That's still a public performance?

MR. BERENSON: Yes.

MR. CARSON: You realize how intuitively that seems to be absolutely wrong?

MR. BERENSON: You want to know something? It may be intuitively wrong to someone but there's case law on it. You have a transmission as an example. There's a public performance when, let's assume, a network, or let's say ABC, transmits its signal up to a satellite, down to a station. That station then takes that signal and transmits it out locally. No question, two separate public performances. Although effectively it's one, they are two separate public performances: one to the station and a second to the audience.

Additionally there is nothing anywhere to require that the transmission be heard. In theory if someone never listens to ABC, it is still a public performance. There's a public performance that takes place.

You don't have to hear it. It could be in compressed time, real time. It doesn't make a difference. It may be intuitive in your mind to say, "Hey, something's not right there."

Realistically there's a public performance. What the value is, that's a separate issue. We're not discussing value here. We are discussing that there is a public performance.

MS. PETERS: Why don't I start it. I was just going to ask you a question, Ms. Horovitz. Do you sell digital downloads? Do you make digital downloads available to your customers?

MS. HOROVITZ: The retailers, yes, are actively engaged with record companies who are making their content available as a digital download.

MS. PETERS: Okay. When you are doing

that and you are making it available, it's not of perfect quality if it's not acceptable. You mentioned the word "returns." How does that play out?

MS. HOROVITZ: We don't know yet and it's a real concern that that language in the EULA about no warrantability. We have real concerns that you as a customer are going to go back to me as the retailer and say, "Hey, I tried to download this thing." Believe me, we're spending a lot of time. Everybody is.

I mean, I don't want to characterize the record companies as not being concerned about this or the DRM companies or any of them yet because everybody is spending an enormous amount of time and energy in trying to make this stuff plug and play and work well and seamlessly every single time for the consumer, but it doesn't yet.

The retailers have a lot of concern that you think you've bought it from me. You're going to come back to me and say it didn't work. I need the flexibility. I need to be able to make it right for you.

MS. PETERS: But nobody to date has had a problem so they haven't come.

MS. HOROVITZ: Oh, that's not correct. There's a lot of e-mails flying back and forth online about, "I can't get this to work." I have a committee of people at the stores whose companies are, in fact, offering this stuff. I would submit to you that a hefty percentage of the actual purchases going on right now are inside the industry trying to see if, in fact, we can all get them to work on our different computers.

MS. PETERS: I'll ask the record company something similar later.

Jesse.

MR. FEDER: Mr. Klein, you indicated concern that the copyright industries are moving towards a pay-per-play world. Clearly that is a new business model that some content companies are trying out. If there is acceptance of this in the marketplace, what's the problem?

MR. KLEIN: Well, the problem is how it's accomplished, I think. As Pamela was indicating, if you have to buy this every time you have lost the file in your computer or a tape, whatever, you have a right to make those copies. I mean, in your home. That's what Betamax said, for noncommercial purposes.

MS. PETERS: For time-shifting purposes.

MR. FEDER: For time-shifting purposes.

MR. KLEIN: Well, time-shifting was a noncommercial purpose. It wasn't the only noncommercial purpose that the court pointed to. It said any significant non-infringing use for noncommercial purposes, one of which was time shifting.

MR. FEDER: Does it identify any others?

MR. KLEIN: It said you can't identify them now because we don't know where the technology is going. If you look at the court opinion, it does anticipate there may be others that we don't know now. Remember, that case is 15 years old.

MR. FEDER: In the intervening 15 years have the courts found any other instance other than time shifting?

MR. KLEIN: I can't answer that. I don't know. I don't recall any. I'm not saying there aren't any. I just off the top of my head have not followed it up recently. I should have probably been able to answer that question but I'm a recovering lawyer in the "12-step program" so I don't keep up with it.

MR. MITCHELL: If I could, I would like to take a stab at that particular angle. Maybe by a sort of segue into it, Mr. Berenson had been making the distinction between a private one-on-one communication as not being a public performance, if I understand that correctly.

MR. BERENSON: I didn't go that far.

MR. MITCHELL: Okay.

MR. BERENSON: I was just using the example that there are private performances. Okay? I didn't define exactly what a private performance is. Again, you take the normal circle of family and friends. If someone is distributing commercial copies, that's not going to be normal circle of family and friends.

I mean, again, if you're going to take that one copy that everyone is pointing there and you want to make a gift of it, you can make a gift of that one. You can't make 100 gifts of that one.

MR. MITCHELL: Not according to EULA.

MR. BERENSON: No, but you can't make 100 gifts of that even in the physical world. You can only give that one to someone. You can't press a button and, poof, there's 100 of them. You're going to have to go buy them to give as gifts.

MR. MITCHELL: Where I was going with that is that if there are circumstances in which the transmission from one person to one person is not a public performance, if it is simply that one transmission from one person to one person, if that's the case, then I think there's a question as to whether there is a Section 106 right and a private performance if that's where we're heading. I'm not sure.

MR. BERENSON: I don't think I'm heading there. Let me say, I know I'm not heading there.

MR. MITCHELL: Coming back to the question of interesting cases, I don't have the site but we had it in our written comments, a case of a court recognizing that actually using a chemical process to lift an image from one medium and place it on another tangible medium was not an infringement of the reproduction right.

Leaving aside where we stand on the issue here, I think most lawyers would agree that there is probably some judge out there somewhere who would take that and say isn't a forward and delete actually is accomplished simultaneously not by a system of trust me, I did it, but actually employing a forward and delete technology that does this automatically.

It's not a very big leap to say if you can use a chemical process to lift a copyrighted image and put it on something else, that you can use a technological method to essentially lift the bits in a virtual sense and place them on another tangible medium.

From the retailer's standpoint, the forward and delete concept, while we haven't taken a real position on the Boucher approach, looking at it from a pure efficiency standpoint, if we think of a local library lending or a rental transaction, perhaps there's a concern on the one hand that we heard this morning that one library can essentially have the one virtual copy and millions of people access that.

But if in reality we have one library that may have several copies that are virtual copies and only one real one but there's a check in and check out type of process so that no more than the ones they paid for are loaned out in the virtual world or checked back in.

Or in the situation of video rental where a video retailer could pay for 20 copies of that video and move those around with a rental transaction as they do today but, in effect, they are checking in and checking out or in a strictly download forward and delete type situation.

Time Warner, for example, indicated that if the system were perfected, they might consider this. It makes logical business sense that if you were going to allow a retailer to download copies that they can implement a forward and delete technology with, that instead of having to download 100 copies for your store, you download one and have a counter in which you've paid for 100 countdowns or however that situation is resolved.

The beauty of it is we gain some efficiency, less clutter in hard drives, a lot more efficient distribution system. Again, that is a business model aspect. One of the concerns we come back to, though, when we talk about business models, when the one business model is selected at the copyright monopoly level, there is no real opportunity for the market to figure this out.

I think it was Mr. Adler this morning who was indicating the desire to have numerous business models out there competing. If we take the music or video industries, and we have five, four, six, depending on what day of the week it is, I guess, companies that control about 85 percent or more of the market, yet we have thousands of retailers among NARM and VSDA members controlling about 85 percent or more of their respective markets, a lot more opportunity for more business models to actually get out there and compete.

The lease model that was given is, What's wrong with a lease? We do that every time." The lease is typically from the retailer, the auto sales person, who is using that as a creative way of competing with the manufacturer's model of selling and query how much would you pay for a new car if you were prohibited from reselling it.

If there is no resell value in that car, there are probably going to be fewer new automobiles made and they are going to be a lot cheaper. Again, it's not a copyright issue but to use that model, as long as there's choice, NARM and VSDA members -- I should confess I'm counsel for NARM so I'm under that water a little bit -- we don't have too much of a problem with pay for a play if that is a real option where the person can buy the CD or if they want a limited playtime that might be an option at a lower price. When that is selected by a copyright owner as the only way, we see that as a direct circumvention of Section 109 rights.

MS. PETERS: Susan, you wanted to jump in?

MR. KLEIN: I have been informed and if, in fact, you look at the 9th Circuit's decision in the Rio MP3 case, that held place shifting was a noninfringing use, not just time shifting. That was fairly recent.

MS. PETERS: That's right.

MR. KLEIN: The other thing is I just want to get back to Mr. Berenson's comment. When you rent a video and you watch it, does that not somehow implicate a performance right? No.

MR. BERENSON: Not at all.

MR. CARSON: Public performance.

MR. KLEIN: Public performance.

MS. MANN: May I? Because I think there are a number of things that have come up here that I think I would like to respond to. I want to make clear, though, for the benefit of the panel and for any press that are in the room that neither Marvin nor I represent record companies. People less familiar with the industry may not recognize that.

There have been a number of issues raised that are grievances between retailers and recording companies. A lot of stuff has been put out there. In my view, virtually none of it has anything to do with Section 109.

For example, the example that Mr. Mitchell gave of an opportunity that might arise for a retailer to download one copy of a work under license to distribute 100 copies is a business relationship that you can conceive of happening but that doesn't have anything to do with the first-sale doctrine as such.

It is exactly the kind of thing that the industry is going to struggle with as we try to find new and innovative ways to make technology work for commercial users of our works which is what some NARM and VSDA members are becoming as we deal with downloads and end-users of our works.

I would also like to kind of focus the discussion as our esteemed colleague, Professor Southwick, always tells me when the discussion goes awry.

Let's take a look at the statute. In this case, let's not look at the statue but let's look at the text of the Boucher amendment. We have been talking about the Boucher amendment today as though this forward-and-delete technology was part of the proposal. It is not.

The Boucher amendment was not enacted by Congress. I think everyone will agree with me -- however you want to say it, it was defeated or it wasn't taken up -- it was not approved, we can agree that there's a world of difference between a bill introduced and one enacted.

This was a bill that was introduced. It got some airing. It was not enacted. The language of the Boucher amendment as it was described at the time of that venting was defended on the grounds that we could use the honor system to do this.

I will say there were many members of Congress, in fact most, who said that doesn't really pass the red face test. Now we're coming in here and we're hearing about forward-and-delete technologies.

I'll say again you guys on the retail end, you think you've got problems with people who can't effectuate downloads. What are your customers going to do when they forward something to Grandma and the copy on their hard drive disappears?

We don't see that the -- I mean, look at Napster. People want to share. People want to propagate. That's the reality that we've got to deal with in the market place. That's the e-commerce thing.

I asked around and consumers are not asking for forward and delete. I think what that does is get us the excuse for the Boucher language. I'll say, okay, let's talk about putting forward/delete in here and having the folks who want it implemented pay for it.

That's another issue. How much does this forward and delete technology cost? When we as music publishers, and these are the guys I represent, our royalty on a download is a little more than seven cents.

We went to folks and we said, "How do we protect this stuff if we are going to do it ourselves. How would we do it?" They came to us with technologies. Not forward and delete because we weren't interested in that. We were looking at something that would inhibit copying. An access trigger that would also have a copy protection. We were told it would cost 25 cents a transaction.

Well, what economic sense does that make when your payment is seven cents? The mandate here is to look at electronic commerce and the interplay with new technologies.

Let's not just say that this is good as a matter of law and good for electronic commerce if we don't have a clue really what it is we're talking about. That's before you get to the issues of whether this technology would work or not.

You know, Gary, we're not talking about piracy. I didn't use the word piracy once in my statement. We're talking about electronic commerce. I don't think your guys are pirates. We're not talking about piracy. We really want to make this work. We are struggling with making this work. I guess I've ranted enough.

MR. MITCHELL: If I could just jump in here. In terms of clarifying the retailer position, retailers, I think, are affected as much, and many retailers would say more than the copyright owners when there is piracy. Any part of copy is a potential lost sale to the retailer.

It was curious that NMPA had indicated that it was impossible to do business with entities who give music away free. My note here, I'll indicate attorney/client communication, disclosure is like record companies who give away thousands of --

MS. MANN: It's their property.

MR. MITCHELL: Royalty free, I might add.

MS. HOROVITZ: I think John is just making the point that retailers live with a lot of free music in the environment around them. That's all.

MR. MITCHELL: That's the point.

MS. MANN: We don't always get payment on free goods either. That's something we deal with. But the point is that is part of our own promotion in our industry that we as rights owners control.

That's not Napster where somebody else is creating a "business model" that derives -- let's hope from my lips to God's ears -- that we find a way to make that work because consumers want it.

You know, I hear you but we can't conflate all this into a discussion of Section 109 and first sale. Some of these issues are just out there.

MR. MITCHELL: I do want to clarify that retailers or not for that reason calling for a "trust me. I really did delete it when I forwarded it" type of permission which we believe because of the difficulty on policing, that really makes it a nonstarter, although as has been noted --

MS. PETERS: Stephen King found that out.

MR. MITCHELL: Yeah. It's the kind of thing that can already be done in terms of copying. Who is out there really policing the copies that you may make.

I do think one of the things we retailers do want to make clear is that if forward and delete technology is implemented, even if it's by permission of whoever has to give those permissions, that copy then becomes a lawfully made copy.

First-sale doctrine rights still apply to that copy and if they downloaded it onto their CD and want to sell it on the street corner, they have a perfect right to do that. That is, I guess, essentially the point we want to clarify.

MS. PETERS: Marvin and then I'll let Jeff ask a question.

MR. BERENSON: I just wanted to call attention to everyone in the room. I don't know if anyone has seen Dilbert.

MS. PETERS: Actually, I got it from BMI.

MR. BERENSON: I have a funny feeling. Okay. Really, I think it's pertinent to our discussion here. Three employees are sitting around the lunch room and one says, "All music on the Internet should be free. Artists could make money from digital tips." Next cell. Someone walks in. "Great idea. We'll do the same thing here with the engineers." Next cell. "Have you ever noticed that my ideas are only brilliant when applied to other people?"

This is what it's all about. I mean, give it away and let everyone -- in any event, I just wanted to call it to your attention. That's all. I'm sorry you already knew about it.

MS. PETERS: This morning when I came in.

MS. MANN: If Jeff doesn't have a question, I have one more thing on my rant list and it will be very, very brief.

MR. JOYNER: You answered my question during your --

MS. MANN: Just a little point.

MS. PETERS: Go right ahead, Susan.

MS. MANN: I'll be very brief. Just back to my Professor Southwick example about reading the statute. We all need to take a look at Section 109 because one thing that has not been mentioned, to my personal astonishment, in this entire discussion is that Congress has looked in essence at "digital first-sale doctrine" three times. Three times.

Each time it has said, "Digital is different and we've got to look at putting some brakes on the first-sale doctrine." It did so in restricting the commercial rental of computer programs once, a permanent feature of the statute, and in sound recordings and music twice.

The features of the debate each time were the particular vulnerabilities of these works to abuse in the marketplace if the first-sale doctrine were allowed to apply in force.

Maybe some folks should be a little bit circumspect about what they ask for. I mean, Congress was very, very concerned with the advent of the compact disk. This is when sound recording rental rights came in. That provision was sunsetted. Congress decided to remove the sunset provision because it was convinced that rental of digital copies would be a persistent problem.

MR. MITCHELL: I feel compelled to respond. I'm sorry, Susan. You say things that are stimulating. Retailers are very much involved in both of those decisions by Congress. Very closely affected.

On the sound recording end, I think it's really important to note here that the initial exception had nothing to do with digital rights. We were talking about cheap old cassette tape players. We wanted to prevent people from renting an LP or maybe another cassette to make a copy. That was a concern there.

I think it's critical to note here if we're going to talk about digital, it has nothing against digital per se. With the software there was a clear distinction. Kids can still rent Nintendo games and other cartridges and things where the possibilities of really -- the idea that you are going to rent a $500 WordPerfect program or something for a night and copy it and return it is simply not really existent in the video game department.

Can copies be made illegally? Yes, they can, but Congress made the decision there that little bit of leakage wasn't enough to put the skids on the broader distribution that we now have through our sell-through stores as well as through video rental stores.

The rental right is alive and well in all kinds of digital media. And in other countries even where the copyright owner has that rental right, they have actually allowed retailers to rent CDs, music CDs without really any adverse affect. It's not really so much a digital issue as to how do we make sure that we simply don't allow the illegal copies to proliferate.

MS. PETERS: Okay. We need to move on. I want to thank this panel. It was very lively. You woke us all up. If we could bring up the next panel.

Thank you very much.

MR. MITCHELL: May I ask that the two EULA agreements you referenced be entered into the record.

MS. PETERS: Let's start with our fourth panel. We have Professor Peter Jaszi representing the Digital Future Coalition. We have Seth Greenstein representing the Digital Media Association.

We have Steve Metalitz representing a wider range of copyright owners; American Film Marketing Association, Association of American Publishers, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America, many of whom are also appearing on their own behalf.

We have Dan Duncan with the Digital Commerce Coalition and Carol Kunze with Red Hat, Inc.

Let's start with you, Professor Jaszi.

PROFESSOR JASZI: Thank you. Thank you very much.

As you mentioned, I'm testifying today on behalf of the Digital Future Coalition which consist of 42 national organizations representing a wide range of for-profit and nonprofit entities.

Our constituents include educators,

telecommunication industries, libraries, artists, software and hardware producers, archivists, scientists. DFC constituent organizations represent both owners and users of copyrighted materials.

Thus, the DFC is strongly committed to the preservation and modernization in the digital environment of the limitations and exceptions that have traditionally been part of the fabric of the United States copyright law.

It's our common conviction that a balanced copyright system is essential to secure the public benefits of both prosperous information commerce on the one hand and a robust shared culture on the other.

In particular, from its inception in 1995 the DFC has advocated the updating of the so-called first-sale doctrine as part of any comprehensive efforts to bring copyright into the new era of networks digital communications.

In the 105th Congress the DFC strongly supported HR 3048 introduced by Congressman Rick Boucher to implement the WIPO treaties. As I know you have been discussing it already, HR 3048 would have applied first sale, and I quote, "Where the owner of a particular copy or phonorecord in a digital format lawfully made under this title performs, displays, or distributes the work by means of transmission to a single recipient if that person erases or destroys his or her copy or phonorecord at substantially the same time."

This proposal, like the underlying issue addresses, remains highly relevant today. First sale is a venerable doctrine that has long played an important role in balancing the private monopoly interest in information with the public interest in the circulation of knowledge.

Historically the first-sale doctrine has fostered a wide range of public benefits from great research libraries to secondhand book stores to neighborhood video outlets.

More broadly still the doctrine has been an engine of social and cultural discourse permitting significant text to be passed from hand to hand within existing or developing reading communities.

Today at the beginning of the digital era the cultural work of the first-sale privilege is by no means complete. Important as private noncommercial information sharing has been in the analog information environment, it has the potential to become an even more powerful force for progress in years to come.

In this respect, as in others, we should strive to harness the capabilities of the new technology rather than to deny them. If we wish to promote public respect for copyright law's restrictions on piratical and other wrongful reproduction of protected works, we should take care to avoid over extending that law's reach.

Nothing breeds disrespect for law more surely than prohibitions that unnecessarily penalize information practices in which consumers routinely and innocently engage.

The amendment to Section 109 proposed in HR 3048 was designed to accomplish this result, that of updating the first-sale doctrine, without compromising the control over distribution of copyrighted works that rights holders traditionally have enjoyed and should continue to enjoy.

Specifically, we note that the proposal would apply only where there has been an initial distribution authorized by the copyright owner. Thus, it would provide no shelter to those who traffic in unauthorized digital copies.

It would apply only where the rights holder has chosen to make a distribution of copies or phonorecords rather than to make a work available exclusively by means of performance or display.

Thus, proprietors wishing to make material accessible to consumers over the Internet while retaining maximum control over it could achieve that end by employing, for example, streaming technology.

Finally, it would apply only if the person invoking the privilege deletes the copy of the work from the memory of his or her computer system. Thus, the proposal would not immunize individuals making use of various peer-to-peer sharing technologies from whatever liability they might otherwise incur.

Nor would the proposed amendment create significant new enforcement problems for copyright owners, this being an objection that was repeatedly voiced during the deliberations that led up to the Digital Millennium Copyright Act.

Detecting unauthorized transmissions of copyrighted works is an inevitable and necessary first step in any enforcement effort involving the Internet and such detection would be no more difficult if some of those transmissions were, in fact, potentially privileged by virtue of an amended Section 109.

If copyright owners object to being required to show the absence of first sale in connection with proving a claim for Internet based infringement, the burden of demonstrating that the copy previously acquired by the person making the transmission was, in fact, erased or destroyed might fairly be assigned to whoever is claiming the benefit of the privilege.

Now, the legislative proposal just outlined aims to clarify the applicability of the first-sale privilege to digital transmissions. In addition, however, the DMCA itself as enacted puts at risk the traditional first-sale privilege as it applies to the redistribution of physical copies and phonorecords.

In the analog environment, first sale has flourished because transferred copies have been as accessible to the person receiving them as they were to the person passing them along. Now first sale is threatened by copyright owner's use of the technological measures which new Section 1201 provides legal and legal sanction and support for.

Thus, for example, the copyright industries appear committed to the implementation of second level access controls. That is, technological measures that control not only how a consumer first acquires a copy of the digital file but also what subsequent uses he or she may make of it and on what terms.

If a simple password system or encryption device were used to frustrate the exercise of the first-sale privilege by consumers, any attempt to override that technological measure could be severely penalized under the DMCA.

If the potential threat that technological measures posed to first sale is as great as the DFC believes, we would advocate at a minimum an amendment to Title 17 stating that no relief shall be available under Chapter 12 in connection with the subsequent use of a particular copy or phonorecord that has been lawfully sold or otherwise disposed of pursuant to Section 109(a) hereof.

That would make clear that the general policy of Section 1201(c), which preserves rights, remedies, limitations, and defenses to copyright infringement, applies with full force to first sale.

In the same connection we note that the Section 117 privileges of purchasers of copies of software programs, although formerly preserved under the DMCA, are equally at risk from the use of technological protection measures.

The software consumer's rights to adapt purchase programs and prepare archival copies of them were deemed essential in 1980 when what amounted to the final compromise of the 1976 Copyright Act was adopted at the suggestion of the CONTU commission.

Current software industry practice suggest that at least some vendors will take advantage of new technologies and the legal support that the DMC affords them to limit the effective scope of Section 117.

In addition, recent case law may have deprived the Section 117 exemptions of much of their practical force. Recent controversial court decisions involving so-called RAM copying suggest the use of computer programs by purchasers may now be legally constrained in ways that Congress did not anticipate in 1980.

The DFC believes that the current study should consider ways to restore the vitality of the Section 117 exemptions in light of these subsequent developments.

One such means would be to adopt language contained in both S 1146 and HR 3048 as introduced in the 105th Congress stating that it's not an infringement to make a copy of a work in a digital format if such copying is incidental to the operation of a device in the course of the use of the work otherwise lawful under this title.

Finally, we are concerned about the use of terms incorporated in so-called shrink wrap and click-thru licenses to override consumer privileges codified in the Copyright Act such as the Section 109 first-sale doctrine or the Section 117 adaptation and archiving rights.

The report on this study forwarded to Congress pursuant to Section 104 of the DMCA should address additional measures that may be necessary to update first sale, to make existing and updated first-sale principles meaningful, and to preserve the Section 117 exemptions.

Likewise, we hope that the report will recommend new legislation, perhaps in the form of amendments to Section 301 of Title 17 that would provide a clear statement as to the supremacy of federal law providing for consumer privileges under copyright over state contract rules which might be employed to enforce overriding terms and shrink wrap and click-thru licenses.

The DFC strongly believes that the issues to be addressed in this study are critical ones to the future of U.S. copyright law. The Copyright Office and NTIA have a rare opportunity to shape the development of intellectual property in the new information environment. The members of the DFC look forward to benefitting from your leadership.

MS. PETERS: Okay. Thank you.

MR. GREENSTEIN: My name is Seth Greenstein and on behalf of the more than 70 members of the Digital Media Association, or DiMA, I would like to thank you for the privilege of testifying in support of adapting existing copyright laws and principles to accommodate the needs of e-commerce and digital media.

DiMA is a trade association that advocates the interests of companies that build new technologies and business models for webcasting and marketing audio and audiovisual content over the Internet. Our members include prominent Internet music and video retailers, webcasters, and developers of Internet media delivery technology.

Among our core principles, we support reasonable compensation to the creators for their work, but we also support fairness to consumers.

Another of our core principles is that we like to see the law applied in a way that is technology neutral and media neutral. In other words, looking more at the idea of the law, and how it should be applied to the digital context equally with the current expressions of the law that have been enacted with respect to the physical world.

Someone mischaracterized DiMA's goal in this proceeding as being the creation of broad new rights for online companies but, in fact, the opposite is true. What we seek is to preserve and extend historical doctrines that apply to physical media also to digitally-delivered media.

Failing to evolve these existing doctrines into the digital environment would, in fact, unfairly expand the rights of copyright owners beyond the borders of copyright that have been recognized for more than a century.

What DiMA is seeking here was expressly contemplated by the December 1996 WIPO treaties. They explicitly state that it is appropriate to extend and expand into the digital world the existing exemptions and limitations in copyright law.

In the Digital Millennium Copyright Act Congress enacted major new protections for copyright owners in the digital environment, but by taking care of copyright owners they did only half the job. Now it's time for Congress to extend into the digital world the existing copyright law protections for the benefit of copyright users and consumers.

We first made these points in a June 1998 hearing on the DMCA before the House Commerce Subcommittee on Telecommunications, Trade, and Consumer Protection.

We, therefore, were grateful to Congress for mandating the Section 104 study and for appointing as co-equal authors of the study both the Copyright Office and the NTIA, the agencies that are devoted to preserving copyright law and promoting electronic commerce.

Our comments and reply comments explored these issues at great length, specifically the issues of first sale, temporary buffer copying, and archival copying for digitally delivered media. What I would like to do here is to explode some of the myths that have been spun by commenters who contend that no change to the law is appropriate or necessary.

First, the first-sale statute should permit the transfer of possession or ownership via digital transmission of media that have lawfully been acquired by digital transmission.

This common sense result is clearly in keeping with the first-sale doctrine itself whose purpose, as Register Peters reminded us this morning, is in part to prevent copyright owners from restricting alienation or transfer of copyrighted works for which the copyright owners have once been compensated.

Some commenters appear to contend that consumers who lawfully acquire electronic books or music via digital downloading should not have a first-sale privilege. This, in my view, constitutes a radical expansion of copyright principles.

When I buy a book or CD currently if I no longer want it or need it, I can sell it or give it away without any further interference by the copyright owner. For electronic commerce to succeed, consumers require and deserve at least the same value and flexibility that they have come to expect when they have purchased physical media.

As a matter of economic and public policy the first-sale doctrine should continue to exist regardless of whether I acquire that book or CD in a physical form or I download it as bytes to my hard drive.

Some commenters object that implementation of first sale for digitally-delivered media necessarily implies that for some period of time more than one copy or phonorecord will be in existence.

This argument really begs the question,

doesn't it? The issue is not whether the first-sale statute as it is written today literally permits the making of a second copy in order to facilitate the transfer, loan, or resale.

The issue is whether the law should adapt to accommodate the doctrine to apply to digitally-delivered media. Unless the law evolves to allow some copying in furtherance of first sale, consumers who no longer want media that they have acquired would have no choice. The choice that is left to them is basically that they would have to sell their hard drives in order to sell the works themselves. It's a ridiculous result.

Without making a copy there is no way to transfer ownership of a copy they have lawfully acquired. If you want to copy it from your hard drive onto a CD or some other media and then give it away or resell it, well, you've made a copy. The reproduction right is implied.

If you want to transfer it digitally to someone else and then delete it from your own hard drive, you still have to make the copy. Consumers are left with no choice unless we recognize that, yes, the reproduction right is implied but, no, it makes no difference as long as there is only at the end one copy in existence.

There is no reason why a consumer who electronically transmits a track to a friend and then deletes it from his hard drive should be branded an infringer. Why should a consumer that copies a track from the hard drive to a CD-R disk, sells it, and deletes it, be treated as a law breaker?

Perhaps this is really the basic difference between DiMA and opposing commenters. We think the consumers should have the right to act responsibly in disposing of unwanted music or media without being branded as law breakers, thieves, criminals, or pirates.

Now, some of our opponents believe consumers can't be trusted under the first-sale doctrine to delete music that they transfer. Well, this in my view is doubly ironic. Today when I sell a CD, video, or book that I have already purchased, nobody checks first to find out whether I have retained a copy for myself. A first-sale statute would at worst be no different than the status quo.

The second irony is that, through the use of digital rights management or other technological protection methods, technology can ensure in the future that only one usable copy or phonorecord remains after the transfer is complete. Thus, DiMA's proposal and the Boucher proposal, in fact, would put copyright owners in a more advantageous position in the future than they are in today.

Implementation of "forward and delete" technology is not a requirement. I would like to clarify that. It is merely one means of implementing first sale securely. There is no reason why a consumer that voluntarily deletes it from his or her hard drive after transferring it to someone else should be branded as a law breaker.

Furthermore, because it was raised on the prior panel, I would like to briefly address the issue of whether the public performance right also is implicated in the situation where you transfer bytes to someone else and then delete them from your hard drive.

In our view when you read the definition of what it means "to perform or display a work publicly" in the Copyright Act, it states, "To transmit or otherwise communicate a performance or display of the work." When you are transmitting bytes to a hard drive for recording and subsequent playback, that is not transmitting a performance or display. That is transmitting a copy or a phonorecord.

If Congress had meant to say, "To transmit or otherwise communicate a performance or display including a copy or phonorecord of the work," they would have said so. They did not. Clearly the common sense understanding that Mr. Carson was referring to earlier is the one that was intended by Congress.

It is, of course, possible that a real time transmission could be listened to or perceived as well as recorded and, in that case, yes, both the performance and a reproduction right have been implicated. It is also possible for those to be implicated separately.

Finally, I do want to address the timeliness issue as to first sale. It's not premature to address these issues now. In truth, these changes are overdue. Let me give you an example of how uncertainty as to the legal status of first sale will impede adoption of new features in business models.

Go to the Amazon.com site today. You can buy e-books and you can download them. You can buy music and you can download music there. Look around the Amazon.com site a little more and you will notice that for most books, music, and movies Amazon allows its customers to sell their own preowned CDs, books, music, and movies right there on the Amazon.com site.

If Amazon wanted to extend this customer facility to the resale of digitally-downloaded copies, construction of the first-sale statute might prevent them from doing so. It would, in effect, be a perversion of the first-sale doctrine if the first-sale statute were to enable copyright owners to gain more control over the subsequent resale or transfer of the copies of their works.

With respect to the two changes proposed to Section 117, DiMA strongly supports clarifications on both of these points. Regarding the first, temporary buffer copies that are made during the course of streaming audio or video are mere technological artifacts that are necessary to allow media transmitted using the Internet Protocol to be perceived as smoothly as radio or television broadcasts are.

By the way, to clarify, we are not talking about uses of software which are already covered under Section 117. We are talking specifically, as to DiMA, with respect to audio and video.

These buffer copies that are made during the course of streaming have no significance or value apart from the performance itself. Of course, we would argue that these copies justifiably should be protected under the fair-use doctrine. But as the streaming media industry grows, so too does the risk from extravagant claims of copyright owners that temporary buffer copies infringe their rights.

The risk becomes even greater because any legal precedent that would be set concerning the fair-use statute of these temporary copies likely would be set in a case in which publishers or record labels are suing a rather blatant infringer who could not take advantage of a fair-use defense, not in the close case where a solid fair-use defense could be mounted.

Therefore, we would propose that the type of legislative clarification suggested by HR 3048, or by the Copyright Office with respect to memory buffers used in the course of distance education, should be considered more generally for Internet streaming.

As to the second issue, consumers may wish to make removable archive copies of downloaded music and video to protect their downloads against losses. Despite the convenience of digital downloading, media collections on hard drives are vulnerable. Without the right to archive, technical failure such as hard disk crashes, virus infection, or file corruption could render a purchaser's collection valueless.

Similarly when consumers want to upgrade to a new computer or a more capacious hard disk drive, they need some means to transfer their collections onto their new equipment. There needs to be a legal means to make archival copies of this data for such legitimate purposes. Therefore, DiMA would also support amending Section 117 to allow for digitally-acquired media the right to make an archival or backup copy.

Finally, all of these rights should apply to "lawful" uses and copies regardless of whether they are authorized by a specific copyright owner. This formulation is the best way to preserve consumer rights under fair use or consumer rights under exemptions with respect to private performances, i.e., nonpublic performances such as personal streaming from a locker service, and other exceptions and exemptions under the Copyright Act.

Moreover, we also think that Congress ought to consider whether particular mass market "click wrap" license terms should be preempted by federal law so as to secure consumer's rights of first sale and archival copying.

Thank you again for your attention and for this opportunity to testify. I would be pleased to answer any questions you may have.

MS. PETERS: Thank you. Steve.

MR. METALITZ: Thank you very much. I appreciate the opportunity to present the views of the major trade associations of the copyright industry and the 1,500 companies that they represent on the study that's mandated by Section 104 of the DMCA.

I have a prepared statement and I'm going to refer to it but there have been a number of points raised that I would like to respond to so if you'll indulge me in a few verbal hyperlinks from my text, I would appreciate it.

Perhaps the best thing to do at this point in the late afternoon is to step back and ask the question that Admiral Stockdale made so famous. Why are we here? We are here because Congress asked the Copyright Office and the NTIA to study. To study what? To study the effects on two provisions of the Copyright Act of three types of developments.

Those two provisions are Section 109 and Section 117. The three developments are the amendments made by the DMCA, the developments of electronic commerce, and technological developments both in existence and emergent.

They didn't ask you to conduct a platonic survey of the idea of the laws, as Seth has just suggested you do. They gave you a very aristotelian task instead: to look at what has happened. What is the reality on the ground, not what might theoretically happen at some point in the future.

We believe that if you follow this mandate that Congress has given you, you'll find that the effects on the two provisions of the three developments that Congress asked you to look at have been benign and that they don't justify any changes to either of those provisions.

Now, many of the witnesses and submitters have viewed this proceeding as providing a target of opportunity in which they can promote other aspects of their agenda. Some of these have something to do with Sections 109 and 117. Some don't. None of these questions are illegitimate.

If the Copyright Office and NTIA have a lot of extra resources to devote to this study, I think it would make perfect sense to look at them. I think in terms in what Congress asked you to do, it's a rather narrower task.

Turning to Section 109, which codified the first-sale doctrine, it limits one of the exclusive rights of copyright owners, the distribution right. The first-sale doctrine continues to apply in the digital environment whenever someone who owns a lawfully made copy or phonorecord wishes to sell or otherwise dispose of the possession of that copy or that phonorecord.

I appreciate our retail colleagues reminding us that this does apply whether it's analog or digital. If it's a digital copy, it doesn't really matter whether it was the result of a download or it was produced in the factory in Charlottesville that turns out CDs. The first-sale doctrine does apply in those circumstances and retail sale is the paradigmatic first-sale transaction.

In fact, I've heard that the new nondenominational name for the upcoming holiday season would be the festival of first sale because millions of people will go to retail outlets, purchase these digital copies, and give them to other people thus exercising their rights under first sale.

Now, regarding the proposal that Professor Jaszi and other witnesses talked about. Many of them have characterized it as an update or an adaptation or an extension of the first-sale doctrine into the digital sphere. It is no such thing.

It is, in fact, a hyperinflation of Section 109 to impose completely new limitations not just on the distribution right, but on other exclusive rights long enjoyed by copyright owners and notably, of course, the reproduction right, the fundamental cornerstone of the edifice of copyright protection.

These amendments, we think, would distort the development of electronic commerce and copyrighted materials. Remember, that's one of the developments that Congress asked you to pay particular attention to.

There are new distribution models that are competing, or that will be competing in the marketplace. They offer the potential to increase consumer choice, to promote the business viability of the dissemination of works of authorship in digital formats.

As we heard this morning from Nic Garnett and from others, limitations on the reproduction right, like those that are proposed in this amendment to Section 109, would make it impossible to implement many of these models.

Let me just say a word about the forward and delete technological legal solution because, as the witnesses have pointed out, under the Boucher bill it would apply even when no technology was in place. That's one of our problems with it, of course. In our reply comments we give five or six other reasons why we think this is not a wise step to take.

I really can't present them as eloquently as Susan Mann just did in the previous panel but I do want to respond to David Carson's hypothetical, the one that Professor Hollaar told us was impossible.

If this technology somehow did exist and was ubiquitous and worked perfectly and was not circumvented, and if there were circumvention, it would be subject to Section 1201 and so forth, would we still have a problem with it?

I think we might. There are two reasons why. At least we'd have a problem with it as a justification for amending Section 109. One reason is, even I can think of illegitimate business models that would depend upon this technology.

It would not take another Sean Fanning to adapt the Napster model to a delete and forward situation. Instead of simply getting the file from somebody else, that transaction would be accompanied by the deletion of the file on the source hard drive and the accompanying download of that file from another hard drive.

Most files on Napster don't exist in a single copy. There are many of them and you could certainly pass them around quite effectively without going beyond this delete and forward paradigm.

In fact, the witnesses this morning told you that one of their concerns is they want to have a method for temporarily parting with control over the copy of the work and they want to be able to get it back afterwards. That's exactly what this type of business model could allow, and ultimately it could be very harmful to the legitimate interests of copyright owners.

The second and probably more important reason is that, again, if this technology were ubiquitous, perfect, and met all the other assumptions, why would we need to change Section 109?

If copyright owners and everybody else used this technology, I think the best way to look at it would be as either an implied or explicit license to make copies of the material that had been transmitted, on the condition that the technology was also employed to delete the original copy.

Again, this may be a model to which the marketplace will move. It certainly makes a lot of sense in some ways for some applications. The marketplace should be allowed to do so without being placed, as I think Allan Adler said this morning, in a statutory strait jacket of requiring a particular technology to be used.

Let me turn briefly in my remaining moments to Section 117. The DMCA made no changes to 109 but it did change Section 117 and it's interesting that we've heard very little about that amendment. That amendment reaffirmed the long-standing principle that copies of computer programs made in the memory of a computer fall within the scope of the copyright owner's exclusive reproduction right.

This recognition takes on added importance in light of the increasing economic significance of temporary copies in the legitimate dissemination of computer programs and other kinds of copyrighted works. We heard a little bit about that this morning.

There's no evidence that in order to promote electronic commerce--again, this is one of the touch stones that Congress asked you to look at--there's no evidence that to promote electronic commerce we need to amputate part of the reproduction right to the extent it applies to incidental copies or temporary copies.

In fact, the effect of such an amputation is likely to be exactly the opposite. It would undercut in this proposal that has been put forward, the reproduction right in all works.

Its effect could be the most pernicious in the digital network environment because the most prevalent and virulent forms of online piracy can consist of nothing more than making temporary digital copies available without authorization to members of the public.

The proposal also ignores the degree to which any exposure to liability for making incidental copies has been ameliorated by the enactment in the DMCA of Section 512 of the Copyright Act, which limits that exposure in those cases where incidental copying is unavoidably linked to the smooth functioning of the Internet.

In short, this strikes us as a solution in search of a problem or, at least, in search of a problem that is more than, as even its proponents have said, a theoretical illegality.

This brings me finally to Professor Hollaar's concern about the mismatch between Section 117 and what people already do as far as backing up material on their computers.

I agree with him, there is kind of a mismatch there, but what has been the real life practical effect of this? I think the answer he gave was that there hasn't been any. No one has been sued for backing up material that may fall outside the scope of Section 117.

I think this really gets back to the point of what your mission is in this study. Is it to tidy up the loose ends of the Copyright Act and make sure that there aren't mismatches between its exact contours and what people are doing? Or is it to respond to real problems?

I think it is instructive that when Congress has dealt with this question of temporary copies, it has done so in response to real problems. It did so in 1998 in response to real problems that were presented to it by independent service organizations that had been sued and were being held liable for creating temporary copies in RAM. Congress dealt with that problem and spelled out the circumstances under which no liability would apply there.

Congress approached the same problem when it was presented with evidence that there was a threat, at least, of liability for online service providers, for temporary copies that they made in the course of functions that are at the core of the Internet.

Again, Congress responded by reducing the exposure to liability that those service providers would face.

I agree with Professor Hollaar's question that we have an education problem here, the huge task of educating the public about piracy. I'm concerned with how this matches up with reality and with the fact that there is now an alternate reality out there in which Section 117 is synonymous online with unauthorized copies.

I think this issue was pointed up by the submission of the Interactive Digital Software Association in the first round. I would encourage you to look at that submission and to reflect on the fact that today one of the easiest ways to find pirate video games online is to use the search term "Section 117."

The Copyright Act is being used to justify piracy and, to be frank, that is not right. That is the type of problem that I think the report ought to focus on rather than the theoretical illegalities that have been proposed to you.

Thank you.

MS. PETERS: Thank you.

Dan.

MR. DUNCAN: Thank you. Thank you for the opportunity to testify today. If Steve and the good Admiral are confused as to why we are here, I'm certainly confused as to why I am here today but I think there is a very simple answer and it has to do with the comments filed originally by both the libraries and Digital Future Coalition urging that the study recommend amendments to Section 301 to preempt state licensing laws and practices.

I represent the Digital Commerce Coalition which was formed in March of this year by business entities whose primary focus is to establish workable rules for transactions involving the production provision and use of computer information. Computer information under that uniform law refers to digital information and software products and services.

DCC members include companies and trade associations representing the leading U.S. producers of online information and Internet services, computer software, and computer hardware. Together they represent many of the firms that have led the way to the creation of new jobs and new economic opportunities that are at the heart of our new electronic commerce.

Our common goal is to facilitate the growth of electronic commerce. We believe that the enactment of the Uniform Computer Information Transactions Act, better known as UCITA which has been referenced many times today, and passage of that law in every state would best advance the goal.

UCITA is a well-considered statute. It balances the interest of all parties in forming workable contracts and licenses for computer information. By adapting and modernizing traditional tenants of U.S. commercial law for the digital age, UCITA will bring uniformity, certainty, and clarity to the electronic commerce across the 50 states. I think these are goals that we all share.

As a general matter DCC feels it is important to emphasize the traditional and necessary distinctions under U.S. law between the federal system of copyright protection and the state role in determining agreements among private parties including contracts and licenses.

For over 50 years the Uniform Commercial Code, the UCC, has governed the relationships between sellers and leasers of hard goods on the one hand, and buyers and lessees of those goods on the other.

In many instances this includes the hard copies of informational products and services. The various articles the UCC have worked well in fostering commerce across the various states which have, in turn, adopted these articles largely in a uniform manner.

UCITA is a new uniform commercial law developed and approved by the same body that wrote the UCC, the National Conference of Commissioners on Uniform State Laws.

As with the UCC, UCITA has been thoroughly debated and carefully crafted over a multi-year process and is intended to help facilitate the new electronic commerce. It is intentionally broad in scope. The act covers computer information and covers transactions for software, electronic information including copyrighted works, and Internet access.

As has been traditionally the case with uniform laws in this area, UCITA rules govern agreements private parties and the licensing of computer information. It does not create or alter the property interest that persons may enjoy in respect to these products.

Those property interests are determined by relevant state and federal laws including the federal Copyright Act. The careful balance is upheld by the courts as necessary and effective to the efficient provision and use of information, as we note in our reply comments by citing Pro-CD, and one that both the federal and state governments must strive to maintain.

As I mentioned, UCITA is a new uniform state commercial code developed almost over a decade and approved by NCCUSL, the same body that wrote the UCC. They wrote UCITA for the same reason as they needed the UCC.

The problem is that in the UCC it covers only hard goods, tangible goods. We needed a law and NCCUSL recognized this based on a recommendation by the American Bar Association over 10 years ago for a law to cover transactions in tangible information.

The existing legal infrastructure provided by UCC Article 2 does not work well in facilitating electronic commerce. NCCUSL recognized that, drafted and approved UCITA which is now awaiting passage in the 50 states.

One of the things that we've learned in terms of electronic commerce is that it is useful to have uniformity and that is the primary goal of UCITA and one that we think it would accomplish well.

Part of the irony in the comments filed by both the DFC and the libraries is that they are seeking to preempt a law which is yet to even go into effect in more than one state.

We believe at the very least the study should reject that recommendation and give the states a chance to fully debate. I can guarantee you as one who has been involved in those debates that fair use issues are very much at the forefront of what state legislatures are considering when they consider passage of this law. But allow the states to do their jobs. Do not confuse the need for a licensing and contracting law with reform suggested for the copyright law.

Indeed, UCITA makes very clear that federal copyright law will be preeminent. It states, for example, that a provision of this act which is preempted by federal law is unenforceable to the extent that that particular provision is preempted.

It also states that if a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term or limit the application of the impermissible term so as to avoid a result contrary to public policy.

It notes particularly in the legislative history accompanying the act that fair use, innovation competition, fair comment, and copyright law are among fundamental public policies that courts must make note of. In short, UCITA does not say whether a contract can be made under federal law but how it may be made if it can be made.

In Subsection 105(b) there is an emphasis that fundamental public policies regarding fair use, reverse engineering, free speech, may not be blindly trumped by contract. Courts are directed specifically to weigh all the competing policies including freedom to contract.

While these UCITA provisions may not meet the over zealous demands of the DFC and the libraries for new statutory creation of rights for users of computer information, it is clear that state-based law properly defers to the supremacy of federal law on issues involving fundamental public policies including the applicability of the Copyright Act's fair-use exceptions and the latest provisions of the DMCA.

To do otherwise would have risked disturbing or even destroying the delicate but deliberate balance that U.S. law has always maintained between the federal system of copyright protection and the state role in determining agreements among private parties including contracts and licenses.

In conclusion, the Digital Commerce Coalition has as its primary purpose and goal the enactment of UCITA in the 50 states in order to facilitate effective electronic commerce.

Nevertheless, DCC and its members are also concerned that other activities including this current study at the federal level not go forward without a clear understanding of the nature of UCITA and its intended effects. Contract law should remain contract law. Copyright law should remain copyright law.

Thank you.

MS. PETERS: Thank you.

Ms. Kunze.

MS. KUNZE: I'm Carol Kunze. I'm here on behalf of Red Hat. Red Hat, Inc., is a public corporation that has headquarters in North Carolina. Red Hat distributes a product called Linux. Linux is an open-source operating system.

You should have a hardcopy of my testimony in front of you. If possible, I would like that made part of the record. I encourage anyone else who wants a copy to give me a business card and I will e-mail you a copy.

I have a very narrow focus today. I want to explain what open source and free software is and to ask that you not recommend amendments to Section 109 which would jeopardize the ability of open source and free software licensor to define a product as software plus license rights.

Let me just clarify that I don't think anyone today intends to impact our licensing practices. I haven't seen anything in the comments, nor have I heard anything today that makes me think someone does have that intention. What we're concerned about are unintended consequences of any amendments to Section 109.

The primary difference between digital and nondigital products with respect to Section 109 is that the former are frequently licensed. When the license includes the authorization to exercise some of the copyright owners exclusive rights you have a fundamentally different product.

Open source and free software represents a different paradigm both in terms of how the software is developed and in terms of how the software is distributed.

With respect to the development, it's created by a collaborative process and can be reached by any number of programmers basically who volunteer their services.

Open source and free software is accompanied by the grant of an authorization to (1) have the source code, (2) freely copy the software,

(3) modify the software or, in copyright terms, to make derivative works, and (4) to distribute the software either in the original form or as a derivative work.

My final point is that open source and free software does not involve the payment of copyright license fees. Basically it's free. When you see a box version for sale on the shelf, essentially what you're paying for is you're paying for a very nice package, you're paying for printed documentation, and you're paying for installation service. But that product is also available for free downloaded from the Internet without the printed documentation, without the box, and without the installation service.

Many open source and free software products also embody the concept of copyleft. Let me explain that. Copyleft is the requirement that all copies must be distributed with the license authorization. That allows the person who has that software to make a copy of it, to have the source code, to modify it, and themselves to redistribute it.

So, use of an open source free software product is generally unrestricted. You can use it for personal purposes. You can use it for commercial purposes. There are not restrictions on that.

Copying is unrestricted. You can make a copy if you want. You can make 1,000 copies if you want. You can run it on a network. I haven't seen anything called an open source site license. I think because you don't need one. If you want to make a copy, you can go ahead and do it.

Simply modification is unrestricted so if you want to tailor the software to some particular needs that you have in your company or to some particular personal needs that you have, you can go ahead and do that. Not only are you authorized to make that modification, but you also have the source code that you need in order to make those changes.

But distribution is conditioned on passing along the same license authorization under which the work was received. This means that anytime a copy is transferred it has to be accompanied with the right to have the source code, to copy the product, to modify the product, and to distribute the product.

What this means is that any single copy of the product can basically be the source of thousands of new copies. Actually, I think that is what a lot of people here are concerned about today.

What's more, it can also be the source of thousands of improvements to the program. Now, the condition for being able to make and distribute a derivative work is that it be licensed under the same terms. What this means is that if you make improvements in the product.

For instance, when Red Hat makes improvements to Linux, it has to make that source code available to anyone who wants it. It basically has to publish that source code so other people have the opportunity to adopt those improvements into their program.

In effect, the principle is that you take free software from the open source and software community that created it, but in exchange you give back to them on the same principle any improvements that you have made in the product. Basically it's a quid pro quo.

One of the reasons that people engage in this activity is they put an open source product out there on the market and what they get back is their own product with some improvements to it that they can then adopt into their program.

This concept of copyleft that the software must be distributed with the license rights to copy, etc., is needed in order to ensure that the product stays free. If you transfer the product without those license authorizations and without the right to have the source code, you have essentially changed that into a proprietary product.

That is not the product that the licensor authorized be distributed. The product that the licensor authorized was the software plus the license rights. Open source and free software allows users to study the software, to change it, to improve it, to make derivative works, to build upon the ideas, to incorporate these ideas into a new product and to redistribute that derivative work.

We believe that it clearly furthers the goals of the Copyright Act to disseminate information and ideas throughout society and to allow others to build upon those ideas. We are asking that amendments not be recommended that would jeopardize the ability of open source and free software licensor to require that the entire product be transferred. That is, the software and the accompanying license rights.

Thank you.

MS. PETERS: Thank you.

Now for questions. Do you want to start?

MS. POOR: Sure.

Professor Jaszi, you stated in your

testimony summary that if first-sale is further restricted progress of knowledge and advancement of ideas will be curtailed. Firstly, why do you sort of take the view that it's a restrictive approach rather than a possible expansion? Could you give us reasons why you're advocating for a change now?

PROFESSOR JASZI: On the first point, I think that it's very much whether one views what is proposed as maintaining or updating, on the one hand, or an expansion on the other. It's pretty much a function of perspective.

The DFC starts in thinking about the exceptional doctrines of copyright law, whether it's first sale or fair use or others, and in terms of functionality, in terms of what those doctrines do, what they have historically permitted to occur.

In the case of the first-sale doctrine, that is the transfer of copies from individual to individual so that knowledge circulates within whatever community those individuals represent.

I think if you take that view, if you begin with a functional description of how the exceptional doctrine, in this case first sale, works, it's very difficult to characterize what is being proposed as an expansion or hyperextension of the doctrine in that it is a proposal that is designed merely to reinstate that historic functionality in a new environment.

I think if we could all agree that we want a functionality like first sale in the digital environment and that we are just disagreeing about how to achieve that, we could probably wrap this up very quickly.

My sense is that is not really what we disagree about. What we really disagree about is whether there should be such a functionality in the digital environment. The DFC obviously feels strongly that there should.

On the question of why now rather than, I suppose, why later, the answer I think is that -- here I think I disagree a little bit with something that Steve said -- I don't think that the charge of this study is formally limited to considering only evidence as to harms that have already occurred and can be concretely documented in the current information environment.

That may well have been the charge with respect to the 1201(a)(1) rulemaking. I think with respect to this study, you have an opportunity and that is an opportunity to look forward and to anticipate the reasonably likely directions in which the rollout of all of the different new technologies of use and of control is likely to go.

My answer to why now, I think, is because later it's likely to be too later. Later the argument will be all of this has already happened. It's in place. It's a given and we wouldn't now want to upset the new status quo.

My little proration about how you have an opportunity to led here was not just a kind of rhetorical flourish. It was really my view of what you have the chance to do if you take your mandate as I believe it was given.

MS. POOR: Why would it be better than to -- why would it be better to mandate or to ask Congress to mandate something and not let the marketplace further development it?

PROFESSOR JASZI: I think the answer is that first sale has never been a creation or function of the marketplace. First sale has always been a condition of the functioning of the market. First sale has always been a legal limitation on what the marketplace could achieve.

I'm sure that if we had not had first sale over time, other business models would have developed in which additional rents would have been extracted for the downstream circulation of intellectual content in which multiple payments, in effect, would be extracted for the use of one copy.

To say that the market ought to control on the question of whether we should have the functional equivalent of first sale in the digital environment seems to me to perhaps wrongly characterize what that first sale functionality has always been; that is, as a limitation on market function. This is essentially a cultural as well as a commercial issue, in other words.

MS. POOR: Are you aware of any consumer cries for the first sale in the digital world?

PROFESSOR JASZI: Well, I think I represent one.

MR. GREENSTEIN: If I could answer that, I think the reason there have been no consumer cries is because there's been no lawsuit to date. That's not to say the consumers don't believe that's a reasonable thing to do. The companies that are building the technologies to digitally sell music and audio and video by downloading run into this problem because when they are trying to build their systems, when they are trying to build their services.

When Amazon thinks about how they are going to build their consumer-resale system into the future, they have to take into account the advice they are getting from conservative lawyers who say, "If I read Section 109 literally, you have a problem on your hands and you can't really go there."

Now, that's not to say again that the problem does not exist in theoretical terms because it does. It does not exist in practical terms because nobody has taken action to prevent it.

Now, that is also not to say that anything that has been suggested in either HR 3048 or by DiMA would have any impact one way or the other on the kinds of things that Mr. Metalitz is afraid of with respect to Napster and such technologies.

A law to allow transfer of a lawfully-acquired copy to a single user and then deleting it afterwards has no impact on whether Napster is any more legal or illegal the day before it passes or the day after such a bill would pass. It merely legitimizes conduct that I think anybody would consider to be fairly responsible conduct under copyright law.

MS. PETERS: Can I just ask a follow-up on what Marla was asking? People who just basically pay to get a digital download, is there an expectation on their part that they think that they can transfer this intangible thing?

I mean, it's not like I have a physical object and I think I have a right to do something with it. I now have something on my hard drive that I didn't have before. Certainly with the stuff that I download, it's just the stuff that's free but I certainly don't feel that I have a right even if I pay for it to exercise what I would consider a first-sale right.

MR. GREENSTEIN: I think that a consumer, thinking practically in terms of what their current abilities are when they buy a particular product, would think that they have that right. I think consumers do it now. Again, this just hasn't been brought up in a lawsuit and the restrictions have not yet been enforced against them.

MS. PETERS: If it's between like transfer as opposed to sharing where I got it and you got it.

MR. GREENSTEIN: Yes. I think that's very likely to happen. I can certainly foresee a circumstance where I download a song by a particular artist. I don't like that song but, you know, I know a friend who really likes it so I'm going to send it over to him and delete it from my hard drive because

I don't really want it and I don't like it anymore. Why should that be a problem for anyone?

MR. CARSON: Do you think in the real world people actually are deleting and sending to other people?

MR. GREENSTEIN: Oh, yes. Absolutely. I'm sure when people find that they don't, like a song -- you know, music takes up a lot of space on hard drives. People don't --

MR. CARSON: You think they're sending it to someone else before they delete it?

MR. GREENSTEIN: Possibly they are and possibly they aren't. Again, there the issue is we're trying to build a robust and logical e-commerce system where consumers have certain expectations.

They have for decades bought physical CDs, bought physical books, and have been able to do with them as they wish. When a time comes, and we hope the time never comes that a consumer bumps smack up against a restriction imposed on them because the first sale doctrine was not updated, there is going to be a tremendous hue and cry and the hue and cry is not necessarily going to be first to Congress.

It's going to be a backlash against e-commerce companies that are selling them something that they think is insufficient, inadequate, and does not deliver to them the full value and flexibility that they expect from CDs, from books, and from hard copies of goods, as well as from digital media which inherently people view as being more flexible and capable.

MR. METALITZ: Could I jump in on this? It's always difficult to see clearly in the crystal ball. I'm 180 degrees different from what people characterized my position as.

I think it was perfectly appropriate in the rulemaking proceeding for you to look at the likely effects. Congress said look at the likely effects. Here Congress said look at the effects, which suggests to me they didn't want you to look in the crystal ball.

You are certainly free to do that. You have a lot of flexibility. This is a study, not a rulemaking. The problem is it's very hard to see in that crystal ball. We don't know what consumers are doing now and we certainly may have very different views about what consumers will do or will want in the future.

One mechanism we can use to clarify what's in the crystal ball is called the marketplace. There are many different models out there and many of the copyright owner models include some ability to transfer the digital downloads, to make copies of the digital downloads.

These models come with digital rights management technologies which, as we heard this morning, are still a work in progress. I think we could expect that to be the case for sometime to come.

We should give the marketplace some opportunity to help us see a little more clearly what it is that consumers want and what is most important to them. What are they willing to pay for, because we are talking about electronic commerce here.

Let's not put them in the statutory strait jacket of saying no matter what the marketplace will develop, if you follow this technological model or if you do a delete and forward, that's fine and there's no control over it at all. Let the marketplace educate us a little bit about what consumers really want here.

PROFESSOR JASZI: If I could just respond, I think the question about what consumer's expectations are is a very interesting one. And also, in fact, a very difficult one to know. I would enter the analysis at a different point.

Although there is certainly an extent to which consumer expectations ought to shape law, I think there is a very, very important way in which law shapes, or should shape, consumer expectations and consumer behavior.

Mr. Carson earlier said, well, people are probably not deleting and forwarding. They are probably blasting out copies in all directions. I don't know to what extent that is true of general conduct but I think the law has a very appropriate role to play in saying what is and what isn't permissible activity.

I think that when we maintain a legal framework in which everything is impermissible unless licensed in the digital environment, we are, as I tried to say before, inviting significant new levels of disrespect for law.

MS. POOR: I guess I would just want to say that consumers in this -- you know, one of the benefits to the Internet is that consumers' voices have been heard more clearly than ever before. They have certainly sent the message that digitally downloaded music is what they want.

They have certainly sent the message that they want to share the music. But have we heard that they want to have the music and then be able to transfer the music digitally?

PROFESSOR JASZI: It depends a little, I think, on how one defines the universe of consumers. I think that there are many individuals who, as Seth described, would very much like to have the legal functionality of being able to use whether, in fact, they liked it while they were using it or didn't like it while they were using it, digital material and then transmit it.

I think that many of us who read material on line, clip it, and pass it along to another individual whether it's a text or a Dilbert cartoon, and then to avoid jumble on our own systems do, in fact, go through the routine of deletion nearly simultaneously, if not always perfectly simultaneously, are enacting that.

There are also consumers. There are schools and there are libraries. There are institutional consumers of information whose very functioning depends on the functionality of fair use. They are being heard from. They were heard from this morning. In a sense through Digital Future Coalition they are being heard from again now.

Consumer preference is not only the

preference of the music consumer but really the preferences of a much larger and more diverse, and I must say sometimes I think more responsible, group of other consumers as well.

MS. PETERS: Jeff.

MR. JOYNER: You've answered the 30,000 foot question dealing with the marketplace. I think I need to bring it back down to a nuts and bolts issue. I only have one question directed primarily to the Digital Futures Coalition and DiMA. It stems from something that Mr. Metalitz talked about today involving Section 512 of the Copyright Act.

Does that section which fashions some limitations on the remedies that apply to infringement including all the incidental copying that may occur in the course of activities that are essential to the functioning of the Internet, does that provide you sufficient, I use the word, coverage so that no change to Section 117 would be needed?

PROFESSOR JASZI: My answer would be no. The 512 provisions on incidental copying are certainly very helpful and they are particularly helpful for those who qualify as Internet service providers within the meaning of Section 512.

There are many of us who do not claim to be Internet service providers for whom Section 512 really doesn't provide any particular relief. It is to them, and to others who don't clearly have the benefit of the Section 512 safe harbor for incidental copying, that I think the proposed amendments to Section 117 go in particular.

MR. GREENSTEIN: I absolutely agree. I think while 512 certainly is extremely helpful for the intermediaries, it doesn't solve the particular problem for Internet webcasters and Internet broadcasters. Because at the end of the process after you get through the ISPs, when you get to the end-users' personal computers, they are making a buffer copy for some period of time that is used in order to facilitate the performance.

Mr. Metalitz asked earlier how does this change to 117 promote electronic commerce. This is it. If buffer copies are deemed to be infringing copies, it would have a tremendous economic impact on webcasting which is already, quite frankly, substantially at risk.

If you read the newspapers, trade press, you'll see that there are any number of webcasting entities and music and video companies -- very respectable ones, reputable ones -- that have unfortunately had to close their doors for lack of funding and because the business model wasn't quite there yet.

The issue for us is that we are willing to pay license fees, but we don't want to pay twice for the same rights. Here we are paying first to make an authorized performance. We are paying for both the music performance rights and the sound recording performance rights.

When it gets to the computer buffer and somebody says, "Wait a minute. Yes, I represent the same copyright owners that you've already paid once for the performance but there's this reproduction going on so you need to pay me again."

This is a real-world problem. You heard earlier today one half of the double-dipping problem that we face. BMI and other performing rights organizations claim that every time you download that's a performance. Well, we're hearing it the other way, too. Every performance is a download because of this streaming buffer that's made.

Frankly, we're happy to pay once. We don't want to pay twice. We can't afford to pay twice. It's hard enough to afford paying once in this current environment when you're trying to establish a new medium and a new market place.

That's the real-world impact that this change to Section 117 that we've asked for would incur. Again, it's a very narrow change in our view. We're talking about an authorized lawful performance, when a copy is made only in furtherance of that performance and it doesn't have any other economic value other than to facilitate that performance.

MR. METALITZ: Well, with all due respect, this is an old, old story. This is not a webcasting story. This is a story that the broadcasters have used. This is a story that the restaurant owners have been concerned about.

This is a story of whether copyright owners should subsidize certain types of business models by refraining from enforcing, or seeking no compensation for the exercise of, one of their exclusive rights.

That puts the question rather bluntly and the blunt answer is no. This would not be the way. If the business model is not right, I don't think it's up to the copyright owner, to the composer, to the record company or whatever copyright owner is involved, to be forced to forego compensation for exercise of those rights.

Now, there may well be good business reasons to do that and that is why we want negotiation over these fees and whatever other mechanisms are used to set these fees. That's why this is a business decision.

There may well be good business reasons to do that but I don't think it's appropriate to amputate part of the reproduction right because the business model for webcasters isn't working out the way they told their venture capitalist it would.

MR. GREENSTEIN: Steve, you missed my point entirely.

MR. METALITZ: Well, try it again.

MR. GREENSTEIN: I will try it again. The point here is that this copying is purely a technological accident of the way that the Internet Protocol is created. If we were able to do the same kind of transmission via electromagnetic waves that they do with broadcasting, this issue would never arise. We would pay only for the performances.

By the way, we still pay the sound recording right holders for their performances whereas radio stations don't with respect to their electromagnetic wave transmissions. We would still pay them for their rights and we would be paying only once.

But there is a technological necessity because of the way the Internet is designed to operate efficiently that causes this RAM buffer copy to be made. It is not captured in other ways. It evaporates. It is evanescent once the playback occurs.

It has no independent commercial significance and we consider it ludicrous that we would be asked to pay for it twice. But we obviously feel strongly enough about its importance in resolving this issue that we come to you, as we came to Congress in 1998, and asked that it be resolved.

MS. PETERS: Has anyone suggested suing you or tried to, as you say, act ludicrously and make you pay for it?

MR. GREENSTEIN: Yes and yes.

MS. PETERS: Yes and yes. Okay.

MR. GREENSTEIN: Let me explain that two different ways. I think it's important to understand the context. Yes, in every discussion we've had with certain rights organizations the issue comes up and they insist that payment is due for that.

Secondly, the risk occurs because of litigation against potential infringers. For example, take a look at the complaint that was filed by the music publishers against MyMP3.com. They talked about payments for downloading and downloading was put in quotation marks and never defined there.

Well, in fact, MyMP3.com never allows downloading. It only allowed streaming. For that reason, it was obvious that they were trying to equate and conflate the two, downloading and streaming. That's why the risk occurs.

In our minds also that the rule may be set in a bad case as a bad precedent against an actor that is considered by the court to be an obvious or wilful infringer.

DiMA would prefer, for the sake of facilitating electronic commerce, that the rules be set by policy by the Congress and with the assistance of NTIA and the Copyright Office.

MS. PETERS: Jesse.

MR. FEDER: I have a question for Professor Jaszi.

If I purchase a book and I have a legal right to transfer it, there are certain inherent limitations to what I can do with it. There are inherent technological limitations on copying it, on transporting it, and there are inherent limitations on the way books are marketed

Many of those limitations go away when we're talking about digital information. You can parse out the kinds of rights that a consumer buys with respect to that copy. You can more finely define the pricing for that -- that is all inherent in the technological shift.

My question to you is, Is this proposal with respect to Section 109, the first-sale doctrine, essentially trying to shoehorn digital downloading and digital copying into an analog model where you cannot take advantage of what the technology provides? You must treat it like a hardcopy.

PROFESSOR JASZI: I think the answer is no, but the question is a serious one. I think my answer is firmly rooted in what I said earlier in response to Ms. Poor, that my concern and the concern of the Digital Future Coalition isn't to faultlessly or in an ill considered way simply reproduce an outmoded digital doctrine in a new environment.

Our concern is that doctrine, first sale in this case, although the same probably could be said about the Section 117 exemptions as well had a certain functionality which has produced economic and cultural benefits in the analog environment.

It's that functionality with those attended benefits that we would like to preserve. This is why I say your question is such a serious one. Does preserving that functionality potentially limit the availability of information marketers to engage in exquisite price discrimination and to charge separately for every use of any kind or character of any work, I think the answer is yes.

I think that extending this important functionality into the digital environment does, in fact, impose some limitations on the ability to develop a digital information commerce model based on pure price discrimination behavior. I think, my organization things, that is a price worth paying for the generative cultural and economic benefits which that functionality produced.

MR. FEDER: Does anybody else care to comment on that?

MR. METALITZ: Just to say that I don't know how exquisite it is, but price discrimination can be a very favorable thing to many of the groups in the Digital Future Coalition. Educational institutions, libraries, nonprofits have benefited a great deal from price discrimination.

I think Peter is right that does kind of work if you have a certain amount of control over the distribution practices. I'm not sure that eliminating all control over what's done with digital downloads is necessarily going to be beneficial to many of these groups.

Of course, we were told earlier in the panel we copyright owners would be better off with this amendment and we don't agree with that so I don't expect --

PROFESSOR JASZI: I just have to say that no one is talking about eliminating all control over what is done with digital downloads. That is, I think, the difficulty perhaps with the way in which the question characterized the proposal. It's certainly the difficulty with your response to it.

We are talking about one very particular and very narrow sense in which a traditionally authorized practice would continue to be authorized in a new environment.

As I tried to say in my initial comments, this is a proposal that is specifically designed not to authorize many other kinds of controversial uses of digital downloads. It doesn't apply to peer to peer. It doesn't apply to commercial use, to widespread commercial use. It doesn't apply to streaming.

I want to be very clear. This is not an invitation. Not a throwing open of the doors and a sort of invitation of the bavarian hoards to enter. It's a very, very narrow detailed proposal.

MR. FEDER: Time for one more?

MS. PETERS: Sure.

MR. FEDER: This one is for you, Seth. As you mentioned a short while ago, just two years ago DiMA and DiMA's members were here in Washington lobbying for legislation. A compromise was achieved -- specifically with the record industry -- that was enacted in the DMCA.

That was meant to address what your members seemed to consider to be matters that were absolutely fundamental to their ability to do business in this environment. Why are we here again? What has changed since 1998 that requires further legislation to allow your members to do their business?

MR. GREENSTEIN: I think this is an important question, as DiMA did raise it. In fact, all of the issues that are now on the table were issues that DiMA had discussed back in June of 1998 and were fundamental for us at the time.

With respect to first sale, DiMA was

formed fairly late in the game to be quite frank. At the time the DMCA, I think, had already gone through the Senate process and was on its way to the House and was before the House Commerce Committee.

We testified before the House Commerce Telecommunications Subcommittee and at that time we were told quite frankly that, because of the the absence of germaneness to the pending bill, first sale could not be introduced at that point into the DMCA.

That was an issue that the Subcommittee could not then pursue. However, they did have a strong interest in the temporary buffer copies issue. In fact, we spent a good number of hours negotiating with affected parties with assistance from the Copyright Office and under the aegis and with the assistance of representative Rick White to try to come to a legislative compromise to address the issue.

That would have, I think, taken care of our problems at the time. Unfortunately, a compromise just was not able to be reached before time ran out. That is one of the reasons why Rick White was so supportive of this Section 104 provision, to make sure that the issues were not just cast off of the table but, in fact, were brought back a couple of years hence for reexamination by the Copyright Office.

MS. PETERS: Thank you.

David.

MR. CARSON: Question primarily for Professor Jaszi and Mr. Greenstein.

Proposal to broaden Section 109 to include digital copies, doesn't it ultimately require that we trust the consumer who is transmitting that copy to someone else to delete it?

Isn't it as a practical matter enforcement of that requirement going to be impossible because there really is no way to monitor whether the consumer is in fact deleting that copy or not?

PROFESSOR JASZI: Well, I think that is a critical issue. The answer really is in two parts. First, if, in fact, unauthorized transmissions of copyrighted material should be a problem in the Internet environment, then enforcement action is going to be necessary. Whosever rights are at stake is going to have to initiate that action.

The detecting and identifying the source of the unauthorized transmission is going to be a necessary part of the burden of enforcement whether or not there is any potential defense based on the first-sale privilege.

The other difficulty, I think, has to do with the issue that I tried to address in my initial remarks. This is really the issue of burden of proof. In the traditional first-sale doctrine there is a good deal of disagreement about the appropriate allocation of the burden of proof on the question of whether or not the copy at issue is indeed a first-sale copy.

I think that it is arguable that in the digital version of a first-sale doctrine, that burden of proof ought to be placed on the person invoking the privilege because it would, in fact, we very difficult for the copyright owner to establish through direct proof the nondeletion of the record from the system in question.

I think that the proposal that I make, that of allocating the burden of proof on the issue of deletion to the person asserting the privilege is, in fact, a direct and, in my view, adequate response to the concern you expressed.

MR. CARSON: How is the copyright owner even to suspect that the person who has transmitted it has, in fact, not deleted it, though? Are copyright owners to check out every single transmission of a work to see whether a deletion really happened? As a practical matter it's unenforceable.

PROFESSOR JASZI: I take it that as a

matter of general enforcement practice, that is precisely what copyright owners, to the extent that they are concerned about digital traffic and unauthorized digital trafficking in their works, do. The first step in any enforcement activity is to detect and identify the source of unauthorized transmissions.

MR. CARSON: The only thing that makes it unauthorized is the fact or nonfact of deletion by the person who transmitted it. How on earth is a copyright owner to engage in that kind of --

PROFESSOR JASZI: It is an unauthorized transmission abonicio. It has that characteristic when it is made. The only question that the existence of some first-sale privilege in the digital environment would give rise to is whether the person making or receiving it may have a basis for defending against a claim of infringement.

There, I think, the assignment of the burden of proof is a device calculated to relieve the copyright owner of whatever extra burden the existence of this digital version of first sale would provide. Any enforcement action in the Internet environment or, for that matter, in the physical environment must begin with the detection of unauthorized activity.

MR. GREENSTEIN: I would echo what Peter has said more eloquently than I could have. Essentially what I was trying to get at in my comments was that very issue, that if you have a situation where a consumer has tried to act responsibly, the law today would still brand them as an infringer. It would not allow them to use first sale as a defense to their conduct, and that simply isn't right.

Today when do copyright owners go after people who have engaged in unlawful conduct? When the conduct becomes so great that it goes onto the radar screen and becomes noticeable and starts to have an impact on their economic rights.

Currently today people sell used books, they sell used CDs, and nobody checks to see whether they have copied some portion or all of them first. Why not? Because it doesn't yet have an economic impact on them.

When it does have an economic impact, as in several cases that have been filed by the recording industry and the motion picture industry, at that point they step in.

The issue at that point is, well, in an appropriate circumstance should an individual consumer or group of consumers be entitled to assert first sale as a defense. Under the current statute given the crabbed construction that some people are giving to it, they might not.

Under the first-sale doctrine as it was intended to operate and for the restrictions that it was intended to impose against the copyright owners exercising further restraints on transfers, well, we think that the law should allow consumers to raise first sale as a defense.

MS. PETERS: Steve.

MR. METALITZ: I would just say that shifting the burden of proof is really cold comfort here. This is not enforceable and it would be very easy for the end-user to say, "Yes, I deleted it." And then what do you do, conduct discovery about when he deleted it and look at his hard drive?

I keep hearing that maybe the people who are selling used books have copied them first. Well, this is why the problem with focusing on the functionality and trying to bring that forward into a new environment is a little bit too narrow, in my view, because the functionality has baggage with it.

In the analog environment, as Jesse pointed out, there is a lot of difficulty in standing at the photocopy machine and copying the book before

I take it to the used book store. Here it's as easy to copy as it is to transmit.

In fact, you do it at the same time with one touch of a button. To ignore that difference and say, "It's the same function. Let's just bring it forward into the new environment," I think is to only look at half the picture.

PROFESSOR JASZI: You know, earlier we heard about the importance of trusting the market and I believe a good deal on that.

I also think that there is something to be said for trusting the consumer. I think that it is probably not desirable to build our legal structure on the assumption that people if they are given clear direction and good education about what is permissible and what is impermissible will always misbehave.

MS. POOR: Napster has shown that --

MR. GREENSTEIN: But how would the changes we are recommending for the law have any impact whatsoever on Napster?

MS. PETERS: It doesn't.

MR. CARSON: Napster is a case in which we have shown that a substantial portion of at least one generation of our society has no respect for copyright. It doesn't give a damn about copyright.

Why should be trust the consumer in a fairly similar environment to respect the bounds of the law and say, "Oh, no. I'm not going to send that to someone else without deleting it." Why on earth should we expect that in light of experience of the recent past?

MS. PETERS: Or today in The New York Times Stephen King found out that basically 46 percent of the people said, "I'm going to pay for it when I download it," didn't. That's a pretty high percentage.

MR. METALITZ: I think the other connection to Napster here is, again, look at the text of section 109: "The owner of a particular copy or phonorecord lawfully made under this title." There are many people, there are even many lawyers, and perhaps some sitting at this table, who think that the copies made by Napster users are copies lawfully made under this title.

One of the top lawyers in American made that argument with a straight face to the 9th Circuit. We'll find out how they react to it. If that's the case and then it's okay to transfer that, having made that copy, then we've got a problem.

MS. PETERS: Let me ask in concluding, because we are running behind time, a question that is a international question. We are looking at first-sale doctrine. We're looking at U.S. law.

A number of you were in Geneva in 1996 when the issue of making a work available, most countries chose to go the equivalent of a performance right and, in fact, specifically rejected a distribution right.

In the exact situation you're talking about that here we say there's a distribution right involved and, yes, we have to worry about first sale. As you say, Peter, it's a very important social doctrine.

The rest of the world hasn't gone there at all. How does this play out in the rest of the world internationally with what you are trying to accomplish through an equivalent for electronic downloads?

PROFESSOR JASZI: Well, a two-stage answer. The first stage is that, you're right, the rest of the world doesn't live under a regime of first sale like our own.

MS. PETERS: In think they maybe do. They just don't say that the distribution of nonphysical copies is a distribution. They do have first sale. They just reject that the distribution right is implicated when the sale is not of a physical object.

Anyway --

MR. GREENSTEIN: At some point it seems to me that the consumers in other countries will also run smack up against this problem. What do they do with the collection that they've paid substantial amounts of money for? What can they do with media when they are through with them or no longer want them?

There should be some means -- legal means to accommodate them. That's what we're asking for here. Certainly to the extent that the problem will exist in other legal systems in the future, it's a problem they will have to face.

How they accommodate it may be different, whether they do it through an exhaustion of the distribution right or whether they have to come up with some other means to allow it to occur, or whether it occurs purely through the marketplace first and they never encounter the problem at all, that remains to be seen.

All we can say here is that we are seeing the problem for Internet companies that are trying to build new e-commerce models and it is a problem that we think needs to be solved.

PROFESSOR JASZI: Even more specifically, as Seth pointed out earlier, the WIPO treaties do give us flexibility in extending traditional doctrines of limitation into the new environment.

This is a doctrine which although it may not be uniquely specific to the United States or Anglo-American copyright environment, it is clearly one that has flourished here and one that I would argue has been extremely important in supporting and fostering cultural and economic development and information in this specific copyright system.

Regardless in a way of the practices of other countries around these issues, I think we've got a very, very specific obligation to think about bringing that functionality forward.

MS. PETERS: Thank you very much.

The final panel. We need another chair. We need seven. There's a chair that's over here. Can you move down just a little bit? We need just a little bit more room at the end. Oh, the legs of the table. All right. We'll straddle. Okay. Whatever.

We are now in the homerun stretch, the very last panel. Cary Sherman representing the Recording Industry Association of America, David Goldberg, Launch Media, Inc., David Beal, Sputnik7.com, David Pakman, myPlay, Inc., Bob Ohweiler, MusicMatch, Inc., Alex Alben, RealNetworks, Inc., and Robert Nelson, Supertracks.

I think maybe we'll stick with the order which it is listed there.

Cary, you get to go first.

MR. SHERMAN: Thank you. I'm Cary Sherman, Senior Executive Vice President and General Counsel of the Recording Industry Association of America. I would like to thank the Copyright Office and NTIA for giving me the chance to participate in this study.

I'm going to focus my remarks on Section 109 but I also would like very briefly to address Section 117.

RIAA's position is straightforward. Amendments to Section 109 are not warranted and tampering with Section 109 in the way suggested by some comments would harm the developing digital music marketplace.

We also specifically object to the proposed amendments to Section 109 and Section 4 of the Boucher bill which was rejected by Congress three years ago.

I would like to stress two key principles of copyright law supporting our position which may have been overlooked by the comments in this proceeding. The first principle concerns the nature of Section 109 and the first-sale doctrine it embodies.

This provision of the Copyright Act simply limits the distribution right afforded to copyright owners as it relates to particular physical copies. It does not, as many have asserted, establish rights regarding the use of copyrighted works.

Section 109 says only that one who owns a particular copy or phonorecord may sell or otherwise dispose of the possession of that copy or phonorecord. It is an exemption from the distribution right related to ownership of a copy and it does not address the use of copyrighted works in any respects.

More importantly, Section 109 poses a limitation on the distribution right and only the distribution right. It does not provide any exemptions from the exclusive right to reproduce sound records and phonorecords and the right to publicly perform sound recordings by means of a digital audio transmission.

This important distinction flows from the bedrock concept in Section 202 that mere ownership of a physical copy does not confer any copyright rights on the owner of that copy. When I buy a CD I do not also receive the right to reproduce copies from that CD and distribute them to the public. Nor do I receive the right to transmit performances of the recordings on that CD to the public by Internet webcast.

Section 109 cannot and should not be used to impinge on the other important rights of the copyright owner. In fact, when new business models that relied on Section 109 threatened the reproduction right, Congress took steps to narrow the privilege to protect copyright owners.

In the early '80s record rental stores sprang up that allowed customers to rent used albums and purchase blank tapes on which they could be copied. One store advertised that customers would never ever have to buy another record again.

As a result, Congress amended the first-sale privilege to prohibit renting sound recordings for commercial advantage without authority of the copyright owner. In the early '90s Congress placed similar limitations on Section 109 for computer programs.

Finally it is simply not the case that Section 109 is no longer relevant in the digital age as some have suggested. A digital copy of a work is entitled to the same Section 109 privileges as an analog copy.

In this respect, we agree with the discussion and the comments filed by the National Association of Record Merchandisers and the Video Software Dealers Association.

Specifically we agree that the owner of a lawfully made copy or phonorecord is the owner regardless of whether the copy was purchased or after the purchase of a blank medium lawfully made by exercising the license to make it into a copy.

We also agree that a consumer who legitimately downloads a sound recording onto a recordable CD can resell that CD under Section 109 without infringing the distribution rights of the copyright owner. These statements are correct because they are consistent with the principles of Section 109 and its limitation to particular copies or phonorecords.

What is not consistent with those principles is any suggestion that Section 109 should also privilege reproduction or performance of copyrighted works, particularly in the digital environment where perfect copies can be distributed or performed to anyone throughout the world almost instantaneously.

The limited nature of Section 109 has a practical significance in the Internet world that is overlooked or avoided by many of the comments. Digital transmissions involve the creation of additional copies, not the transfer of existing copies.

It is a fiction to suggest as HR 3048 does that the existing first-sale rules can be replicated in the digital world simply by allowing a person to create new copies of works so long as the original copies are deleted.

Enforcing such a system would be impossible. No one could determine whether these first-sale copies came from authorized copies, particularly in light of the enormous scale of copying that occurs on the Internet every day.

I just couldn't help but think about how we were going to shift the burden of proof and which of the 40 million Napster users we would choose first to apply that "shifted burden" to.

The expansion of 109 is not only unnecessary and unworkable but it would also do great harm to the developing marketplace for the delivery of digital music.

This leads me to the second principle of copyright law I would like to discuss and that is that copyright is a form of property and copyright owners like other property owners must be able to capture the value of that property through the use of licenses and other contracts.

Indeed, rapid development of new digital music business models will require the flexibility of contractual arrangements to meet the expectations of all the parties involved which--includes consumers, distributors, recording artists and record companies.

This is especially true in this new environment where the needs and desires of these groups can change quickly. Furthermore, the use of technological measures to support the contractual agreements of the parties is also essential to the deployment of new music delivery methods.

For this reason we strongly object to the suggestions of some commentors that Section 109 should be amended to place limits on--copyright owner's ability to contract freely with respect to their intellectual property.

As I said before, Section 109 is a limited exception to the distribution right. It does not address licensing or other agreements related to copyright.

In fact, the House Report to the 1976 Copyright Act makes clear that parties should be free to contract regarding the further distribution of particular copies.

I quote the House Report, "The outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of future disposition. This does not mean that conditions on future disposition of copies or phonorecords imposed by a contract between their buyer and seller would be made unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright."

Congress has been wary of impeding the freedom of a contract as it relates to copyright and has only done so in the most limited of special circumstances.

Moreover, other areas of law such as contract and anti-trust are available to resolve any concerns about licensing practices. Section 109 simply is not the place to address these matters.

Even more importantly, these legislative suggestions would stifle innovative delivery methods that consumers expect and demand from sound record copyright owners and other copyright proprietors.

Many consumers would like a try-before-you-buy program where they could download tracks from a CD and listen to them for a short period of time before deciding whether to buy the CD. Those tracks would timeout or otherwise become inoperative should the consumer decide not to buy the CD.

The sound recording copyright owner will not be able to offer such downloads unless it can use contracts or technological measures or both to ensure that the tracks are not further distributed without authorization.

If Section 109 were amended to curtail such agreements and measures, copyright owners could not offer these consumer-friendly alternatives.

For digital delivery of music to succeed, it must provide a much more exciting consumer experience than simply replicating the sale of prepackaged CDs.

Yet, the proposals put forth by NARM and others would mean that sound recordings could only be offered digitally in a manner like physical CDs because a consumer would not be able to trade a different form of access for a lower price or customized selection.

Simply put, if the Copyright Act is amended to limit the copyright owner's ability to license and protect their copyrights, subscription services, authorized peer-to-peer downloads, internet jukeboxes, and other new delivery systems simply will not happen.

Moreover, the suggestion that Section 109 should be amended to address speculative concerns about the use of restricted licenses or technological measures is misplaced.

Record companies are committed first and foremost to making music available to consumers in a variety of convenient formats. Our companies cannot afford to turn off their customers by implementing burdensome and overbearing protection measures in the enjoyment of digital music.

That is why we have spent a great deal of effort over the past 18 months in the Secure Digital Music Initiative to develop systems that everyone can live with. The power of the consumer and the natural checks and balances of the marketplace will go a long way toward preventing the speculative parade of horribles that many of the comments raise.

Finally, turning to the subject of this panel, I would like to address briefly the suggestion put forth by DiMA and webcasters for an amendment to Section 117 to examine so-called temporary copies of works that are made as part of the operation of the machine or device, such as software that uses RAM buffers to play webcast streams or a portable CD player that caches music to prevent skipping.

There is a fundamental reason why such an amendment is not necessary and would be inappropriate. Neither DiMA nor its members provide any concrete examples of where copyright owners have filed suit or otherwise made inappropriate claims based on such temporary copies or how any webcaster has been hampered by any alleged threats.

I am certainly not aware of any record company that has claimed infringement or threatened litigation based on the making of temporary copies.

Rather, the marketplace is replete with examples of webcasters and other Internet music services being licensed by copyright owners with all the permissions they need to operate their business.

The need for any legislative action on this point has not been demonstrated and none should be taken where the likelihood of unintended consequences is high. The language in Section 6 of HR 3048 is exceedingly broad and can be applied to a variety of situations that go well beyond the limited examples described by DiMA.

In the current marketplace where every week brings a new technological innovation that no one had thought of before, the risk of unintentionally creating a giant loophole in the copyright law that will undermine its very purpose is far too great. Let's not legislate to fix a problem that remains only theoretical.

Again, thank you for the opportunity to appear before you and I welcome any questions you have.

MS. PETERS: Thank you. Let's go to Launch Media, Inc., David Goldberg.

MR. GOLDBERG: Thank you.

Good afternoon, ladies and gentlemen. Thanks for having me. On behalf of over 250 employees of Launch Media, thanks for inviting us to testify today. I'm David Goldberg, CEO and co-founder of Launch Media.

We are a publicly traded California-based company that for over six years has developed innovative and compelling ways for consumers to discover new music through interactive media and particularly the Internet where we operate our music destination site at Launch.com.

Since we first launched our website we've attracted over 5 million registered users by providing these music fans with a wide selection of streaming audio and music videos, exclusive artist features, and music news covering substantially all genres of music.

Let me just start by saying at the beginning that notwithstanding some of the public image of certain Internet music content providers in the wake of these high-profile lawsuits, we at Launch have worked very closely with the record companies and the music publishers since we started.

We did our first licensing deal with the major music publishers five and a half years ago. Before we had any product available to the consumer we went proactively and worked with them.

My background is I worked at Capitol Records before I started Launch and we have always believed that copyright owners should get compensated for their works.

As a result of that, we have actually been quite successful in getting licenses from these copyright owners. We actually have the largest collection of music videos available on the web including licenses from major record companies like EMI Music and Warner Music. We stream over 6 million music videos a month to our consumers which is far more than anyone else on the Internet as a result.

We have also agreed to pay the record companies on the webcasting side more than traditional radio broadcasters pay for public performance rights. I think Seth mentioned that earlier.

I do want to address mostly Section 117. I guess I do take exception with what Cary said. I thought his remarks were very good but it is not a theoretical issue about the RAM buffer. I guess on a counter point to that, Cary's assertion that if it isn't a theoretical issue and it is a practical problem, then maybe we should have legislation.

The answer is many of us, and you'll hear from us today, have been confronted on this issue by music publishers who are asking essentially to be paid twice for the performance and as well for mechanical rights in this RAM buffer.

We have not been sued. Frankly because I think they are unwilling to file a lawsuit that they are not sure they can win. We certainly have been threatened and it certainly has been used against us in negotiations over legitimate licenses that we are trying to provide to consumers.

So by advocating a legislative solution, we're not trying to circumvent legitimate rights of content owners. We have a business that is built on paying those content owners. We are trying to make sure that the copyright laws aren't unfairly burdening digital transmissions and basically requiring us to double pay the content owners.

We think this is a real issue today. We at Launch like many other people have come to appreciate the power of the Internet from a content delivery perspective both in terms of the geographic reach of the Internet, as well as the sheer volume of content that can be delivered.

The proposed change to Section 117 would ensure that the Internet remains a very efficient distribution mechanism for digital content of every description by clarifying that these valueless temporary copies which are inherent to the process of digital distribution do not implicate copyrights.

Sort of as a practical example, buffers are, as Seth mentioned, a necessary part of the process of streaming. If we could invent a way -- Alex's company is one of the major providers of the technology. If we could invent a way to deliver a good quality product without creating those buffers, we certainly would. Then this wouldn't be an issue. But today it is an issue.

Maybe in the future it won't be an issue but as long as it is an issue, it is a threat that hangs over our business. Really it's not even -- we don't even need the litigation to happen to already cause us problems in our business.

The threat of litigation, particularly in a growing company like ours, is enough to cause us problems. It is enough to make us agree to licenses that are maybe not as fair as we would like to agree to because we are worried about this litigation.

I think it is also worth noting that modifying Section 117 to take this into account would also help grow other services including some of the subscription services that all our DiMA members would like to provide. We think that this will actually be helpful to everyone in the process to clarify this issue in order to make those services available.

We think that it's in the interest of society as a whole and not just webcasters and content owners that this matter get resolved. All of our society benefits from widespread distribution of knowledge and information.

Likewise, all of society stands to lose if digital transmission of content is discouraged while the question remains undecided. This is not just a music industry issue.

I'm sure it's not in anyone's interest to resolve this issue through litigation which would inevitably be time consuming and costly for everyone involved.

In our opinion and, again, we're not insiders here in Washington, particularly my company which is based out in California, but there's already been way too much reliance on the courts to clarify these ambiguities in the copyright law.

The issue that we address here has broad ramifications extending beyond the streaming of audio and video music content and touching all transmissions of digital media.

This is a clear example of an instance in which legislation and Congress as a guardian of the public interest can and should act to resolve this uncertainty so as to encourage the dissemination of content and information and grow the payments to the content owners.

We think it benefits both consumers and

content owners to clarify this issue. Yes, we benefit from it but I think everyone in the long-run benefits from this clarification.

Thank you.

MS. PETERS: Thank you.

Let's go to Sputnik7, Mr. Beal. Do you want to switch?

MR. BEAL: He's going to cover the technical issues.

MS. PETERS: Okay. We'll go to RealNetworks.

MR. ALBEN: My name is Alex Alben. I'm the Vice President of Government Relations for RealNetworks and I appreciate the opportunity to come here today. I find it rather amusing that we've been having this hearing for several hours and now I get to describe what the RAM buffer actually is. I've heard many interesting opinions about what it does.

To backtrack, six years ago Rob Glaser founded RealNetworks in Seattle. It really was founded on the premise that the Internet would one day be able to transport audio and video programs to consumers around the world. That was not a given in 1994 or even '95.

In that era we had dial-up modems that

trickled information -- I don't know if you remember -- at 9600 baud we used to call it -- to people's computers. The RealNetworks technology solved the problem of how do you move a big media file over a slow network to create a continuous audio experience similar to broadcast radio.

This is what we did. We did this by perfecting a technology called streaming. Since we like to draw pictures in the software business, if you have a large file, say it's a music file but it could be anything, and let's say this file is 1 MB in size.

MS. PETERS: I note that you've drawn a rectangle.

MR. ALBEN: I've drawn a rectangle. If you push this over a rather thin pipe to a user's computer, it would take an unacceptable amount of time over Internet conditions. What streaming does is it takes this 1 meg file and it slices it into packets.

If you take these small packets, they can be routed around the Internet and its various nodes and then reassembled in sequence to the end-user's computer. You are taking a large file, you slice it into packets, and the technology allows the end-user's computer to assemble those packets in the right order, which is the name of the game. You don't want to receive the file out of order. Maybe some people do but most consumers don't.

This is what streaming bits over the Internet is in concept. The system that we have to do this is called the RealPlayer and RealServer System. They facilitate both live and on-demand delivery of streaming programming.

Unlike digital downloads, which require storage space on the user's PC and a relatively fast Internet connection, streaming represents a very efficient and inexpensive way for broadcasters, now we call them webcasters, to deliver audiovisual content to their online audience.

We first demonstrated this technology in August of 1995 with a Seattle Mariners baseball game that was broadcast over RealAudio. David Letterman had Bill Gates on his show that week and essentially said, "Well, big deal. Don't we have a product called radio?"

The difference being that our radio broadcast in the RealAudio format was received by people all over the world who had an Internet connection so that fans outside of the terrestrial radio signal of the Seattle Mariners broadcaster could enjoy the broadcast.

From the outset Rob and the founders of our company sensed that streaming promised to create this new platform for millions of users to become content publishers. There are some important public policy implications of this technology.

At the same time that the traditional media markets had been characterized by concentrated ownership and fewer choices, streaming allows thousands of individuals, businesses, and also established media companies to adopt streaming and to reach a new audience.

In the interest of brevity, let me just skip ahead.

We've always made a version of the RealPlayer available for free and that has led to the rapid proliferation of the platform from 500,000 unique registered users in 1995 to 14.4 million in '97, 48 million in '98, 95 million at the beginning of 1999, and over 155 million unique registered users as of this month of technology that employs RAM buffers to do temporary copies.

The consequence to this is that there are over 350,000 hours of programming created each week in the RealAudio and RealVideo formats alone. We are not the only streaming media company. Microsoft and Apple and some others also have streaming media products that deliver streaming programming.

The revolution that I have been describing is made possible by a technology that is called a RAM buffer and it's an important part of this discussion. Let me take another moment and draw another chart to explain how it works.

In order to ensure the delivery of the continuous and fluid audio or video stream, the RealPlayer stores a portion of each media file in computer memory known as RAM.

I am drawing a user's computer. I will draw with an arrow an incoming file whether it's audio or video. I will make a circle to symbolize a RAM buffer. As you know already, this is not the entire file being received in one shot but that it's packets received individually.

The packets individually live for a period of time in the memory until the computer can render them. Then they are discarded. That is the operation of a RAM buffer which is another, I think, fairly straightforward concept.

The RAM buffer helps straddle short delays in the connection between the streaming computer and the end-user, and the packets in RAM are discarded after they are received.

This temporary storage enables a continuous listening or viewing experience of a long program, but only stores very small segments of any given media file under the normal operation of the player.

RAM buffers are used in a wide variety of consumer products, the Windows Media Player published by Microsoft, as well as consumer electronics products such as the Sony Discman and a host of imitators. Basically any product that you carry that bounces while you're jogging or doing some other activity uses a RAM buffer in order to make sure that you don't get gaps or skips.

We would venture that millions of hours of music and video are enjoyed each day around the planet by people using RAM buffering technology. It's not a theoretical technology. It's very widely used by companies, including RIAA member companies, that have been using these technologies for years.

Despite the incredible growth of digital media distribution over the Internet, copyright law, we believe, has in some respects lagged behind. Therefore, some limited and technical amendments are required in order to give the new digital markets a level of certainty.

I want to stress that because David said it quite eloquently. It's not that you need to face a lawsuit. It is that if a software company is going to make an investment in the new technology, if you face a threat of a lawsuit or even the uncertainty of what the law is, you might not invest in making that product.

We have many other choices and only limited resources so the issue is, if we're going to make this investment and the tens of millions of dollars that it took to create a RealPlayer, which has been distributed for free, we would like to have greater certainty. That creates greater innovation and, as the spillover suggests, greater jobs and opportunity in this whole Internet economy.

So as with the invention of a piano roll, a phonograph and VCR, all of which were opposed initially by content industries because they said there are great uncertainties and this will lead to terrible damage to our market value, if people spoke that way in those days, copyright law always struggles to keep pace with the widespread adoption of a new technology. I have explained the RAM buffer and how this facilitates the user experience.

The changes that we do support in the law, and we realize the changes are not made lightly here in Washington or any other jurisdiction, means that new methods of digital media will not be disfavored as a means of distributing content.

That's a core principle for us and other DiMA companies: that we have a level playing field to continue to offer content to consumers. We hope that the Internet will continue to thrive as a medium for distribution of audiovisual content.

The incredible growth and entrepreneurial activity of the last six years will continue so long as wise policymakers try to create this level playing field for digital products.

Thank you.

MS. PETERS: Thank you.

Now, Mr. Beal.

MR. BEAL: Thank you.

My name is David Beal and I'm an active member of ASCAP, NARIS, and the American Federation of Musicians, and currently I'm the CEO of Sputnik7.com and the RES media group.

Sputnik7 is the leading online entertainment company offering consumers music, film, and animation programming through 24/7 interactive streaming video stations and video on demand.

In addition to our entertainment website, Sputnik7 is the exclusive digital representative for all of Chris Blackwell's entertainment companies such as Palm Pictures, Rico Disk, Hannibal, Gramma Vision, Slow River Tradition, and Manga Entertainment.

My interest in being here bridges my current role as CEO of an internet company with my previous career as a songwriter and producer. The first issue that I would like to address is RAM buffer copying.

As Alex has outlined, the allowance of RAM buffer copying is instrumental for us in delivering consumers a compelling entertainment experience.

Users visit Sputnik7 because they are seeking quality programming. To view that programming they must be willing to overcome numerous technical hurdles such as net congestion, the need for software plug-ins, digital medial players, etc.

Our consumers are inspired by the programming and, therefore, willing to tolerate the technical idiosyncracies that are inherent in the media.

We've gone to enormous efforts to remove these barriers and to deliver the best experience possible the time. The technology will continue to improve and, therefore, we ask that the interpretation of these laws focus on guaranteeing that artists and copyright holders are fairly paid for their work and that consumers are able to access the work rather than focusing on an interpretation that's based on the ever changing technological mediums that are used to deliver the work.

Our interest also extends beyond RAM buffering into first-sale rights and archival copying. The technologies that we deal with may be new but the constitutional basis for the copyright must remain.

If the first-sale doctrine is not updated to apply to digital rights, we'll be enable a paradigm shift taking rights away from consumers and delivering additional power to the copyright holders.

If consumer rights to copy their legally purchased digital media collection into what medium they see fit are not upheld, many of the efforts to expand the distribution opportunities for independent artists will no longer be possible.

The recording industry which we are part of has built a business around encouraging consumers to be responsible, go to the record store, and purchase music so that artists and writers are properly compensated.

As a music fan and a technology buff, I find it personally frustrating that there is still not one place on the Internet that I can visit to purchase all of the music that I want in a legally responsible fashion.

As an industry we must begin to look at how we can give consumers the technological tools necessary to act responsibly and receive the music that they choose in a format suitable for their lifestyle.

At Sputnik7 we regard our users as leading edge customers, not as criminals, and look upon them to guide us in ways that they would wish to enjoy the entertainment in their lives.

The difference in outlook often serves as a barrier between the online and offline entertainment world and has been compounded by recent communication breakdowns in the litigation over the past years.

The debate surrounding digital distribution often focused on the record companies or publishing companies or rights organizations, but rarely does anyone ever consider them as a whole.

The court case and settlements to date seem futile in that not one has led to a solution that enables the industry to move forward in the digital distribution and deliver consumers all of the music that they want in the formats that they want regardless of the label or publishing company or rights organization to which the artist and writers are signed.

Consumers buy music because they enjoy listening to artists or like a particular song, not because it is written by a BMI writer or released on a particular label.

I read the other day that the music business today is about a $40 billion business and asked myself what is the gross potential of this industry. Is it a $60 billion industry in a $40 billion body? Or is it a $10 billion industry in a $40 billion body?

The Internet and the coming age of wireless offers new opportunities to deliver consumers entertainment in so many places and formats leading me to believe that it is potentially a $60 billion industry.

But for significant growth to occur, there needs to be a future in digital distribution. We need to encourage technology companies to find ways to break down the barriers with consumers and gain their acceptance. We cannot continue to approach distribution at the pace which we adopted the DVD audio standard. Notice you still don't see any DVD audio players in retail stores.

As we sit here and debate these issues, I ask that you don't forget the artists, filmmakers, and creators. They need to be enabled to drive revenues from as many potential distribution channels as possible and not be limited to only online or offline exploitation.

To be successful we must not look to the artists to support our business but we must find a way to make a business out of supporting these artists. I'm incredibly excited and optimistic that the years ahead are going to bring us an entirely new level of recording artists and film makers.

I remember when Francis Ford Copolla said in his life's documentary, The Hears of Darkness, that a fat girl in Ohio was going to become a Mozart and make a beautiful film with her daddy's video camera and for once the whole professionalism about movies will be destroyed forever."

I have witnessed this shift in the music business. More creators mean more content and, therefore, an increased need for companies like ours to help consumers find the gems and help film makers and musicians make a living by deriving revenues from their creations in every potential way.

The relationships between many of the online and offline companies are often competitive and hostile. If we work together, we can use the Internet through targeted marketing and direct distribution to enable artists to reach an audience and have a viable and sustainable existence.

I was reading an article the other day about Tracy Bonham. In the article it seemed that she had spent years recording and rerecording her album trying to satisfy the single requirements of her record company. By the time she was finished, her label representatives had moved on to other labels, radio had moved on to new styles, and her album no longer had an audience.

MR. FEDER: A lot of people in the back are having trouble hearing you.

MR. BEAL: Stories like these amplify the opportunity before us to provide artists with an outlet that offers them more immediate access to a potential audience and to provide consumers with a daily digital dose of rigorously selected best of breed programming.

If we marry these with the interactivity and personalization of the Internet, we can cultivate a culturally immediate experience that was previously unobtainable in any entertainment medium.

I ask that when you are considering the issues before us today that you look beyond the territorial bickering that goes on within the music business and the film business and that you focus on finding an interpretation of the copyright laws that will allow for technological advancements that support artists and copyright holders and help them to derive revenue by expanding upon their traditional revenue streams and making their work available to consumers in every way that is technically possible.

As an industry leader, we ask that you not focus on stopping the replication but on enabling the monetization and continue to support artists and consumers in this burgeoning cultural revolution.

Thank you.

MS. PETERS: Thank you.

Let's go to myPlay and David Pakman.

MR. PAKMAN: Thank you, Register Peters. Thank you to everyone for allowing me to be here today. My name is David Pakman. I'm the Co-founder and President of myPlay, Inc. We are the first digital locker service on the Internet where consumers can lawfully store and access their music anywhere they happen to be provided an Internet connection exist.

Before founding myPlay I enjoyed five years in the early days of the online music and media business. First at Apple computer where I co-created the first commercial webcasting network.

Then at N2K which was one of the earliest Internet music companies and was the very first provider of commercial digital downloaded music for sale. In both of those examples copyright owners were paid and compensated fairly for our use of their works.

Launched just over a year ago, myPlay is the category creator and leading music locker storage service on the Internet. We have more than four million customers currently registered and more than 20,000 are being added every day.

The myPlay personal locker enables consumers to store, organize, and then stream back their music collections to them over an Internet connection and, therefore, hear it anytime they happen to log on to their own personal account over the Internet.

Unlike many other sites offering music on the Internet, myPlay has been recognized, in fact, by the RIAA, Artists Against Piracy, and many others for having structured its service in a manner that both complies with the Copyright Act and compensates owners of copyright of musical sound recordings and compositions. We are one of the good guys.

The myPlay service is unique among Internet music services because it offers customers both password protected personalized locker space, as well as the ability to transmit play lists that they have created to the general public of music assembled by customers from their own locker collections.

The myPlay personal locker, the part where just their own music is stored and played back to themselves, enables its customers to organize and stream this music back to them from any location.

The music that they load their lockers with could be provided from their own CDs that they've obtained lawfully or acquired music online. The consumer's use of myPlay as a personalized storage and playback facility is unquestionably a fair use of musical sound recordings and compositions for which myPlay does not pay royalties.

MyPlay does give record labels and publishers the opportunity to offer our customers downloads of tracks and albums and other promotional mechanisms that can be added directly into user's lockers.

MyPlay will, however, pay substantial royalties pursuant to both voluntary music performance licenses and compulsory sound recording licenses for the streaming transmissions, the public playlist, to other members of the myPlay community.

We consider these payments to be just, fair, and complete compensation to copyright owners for our streaming of licensed musical compositions and sound recordings.

However, the threat of copyright owners assessing further royalties for mere incidental copies that bear no independent value to consumers and are a mere technical requirement for the transmission and playback of streams is not only unfair to those of us who obtain the rights through blanket and compulsory licenses. It is both unjustified and will needlessly impede electronic commerce. This is my principle reason for testifying today.

Temporary buffer memory copies for authorized streaming should be explicitly placed outside the copyright owners monopoly powers and right to demand compensation. These copies in buffer memory are technically required for the transmission and playback of streams of music on the Internet both during transmission through the Internet infrastructure and also at the ultimate destination, the user's personal computer, as Alex explained.

There is no practical way to transmit and play back streams without them. These buffer memory copies are not permanent. They bring no value to consumers and consumers will not pay for them. They are mere technical necessities no different, as Alex explained, from the buffer copies made every day in CD players, in e-book readers, and other electronic players of digital material.

Manufacturers of every one of these devices today enjoy a de facto exemption from liability for buffer memory copies. No copyright owner would dream of trying to collect extra fees for any of these uses.

Buffer memory copies are also created during the transmission of downloads of music or of text or graphics, for that matter through the Internet infrastructure and during final processing at the customer's PC.

But, to my knowledge, no website has ever been asked to pay extra for mere buffer memory copies made through the sending and processing of copyrighted material other than musical streams over the Internet. Why should companies like myPlay who offer streams of music and pay blanket license and compulsory license fees for the privilege be treated any differently.

I'm confident that, however, if put to the test these buffer memory copies would be deemed a fair use as mere incidental copies made in the exercise of authorized rights of public performance that do bear economic benefits to the user and copyright owner alike.

However, it would be better for our industry if the status of buffer memory copies were made clear in the Copyright Act. Even if companies like myPlay possessed large war-chests of cash, which we definitely do not, there is no rational basis for us to bear even the threat of lawsuits much less the immense cost of establishing this principle in the courts.

Moreover, the clarification we request should be precise about exempting buffer memory copies for all lawful transmissions and playback, not just those that are licensed. This is necessary to embrace and preserve meaningful fair use which is of great importance to consumers and integral to the myPlay locker service and our business.

Absent such clarification, myPlay and similarly situated Internet service providers would continue to be exposed to the threats from owners of copyright and their representatives who contend that we who stream audio files online must not only pay public performance fees, but also must pay again for fleeting buffer memory copies as if such copies were the equivalent of permanent downloads.

An amendment clearing up this point will benefit copyright owners, too. MyPlay has studied our 4 million customer usage patterns and the economic benefits that can be derived from that usage. There is no rational business model that allows for payments by consumers or advertisers for mere buffer memory copies.

Royalties and payments due for use of copyrighted works are made possible only when an economically rational business can be built in accordance with the use of such works. We believe strongly that significant profitable businesses can be built from the use of copyrighted works. However, no business can be built or expanded solely by commercializing temporary buffer memory copies.

Conversely, if royalties were due on the creation of purely transient copies, there is a substantial danger that presently viable business models would be fatally undermined.

Given the significant amount of uncertainty surrounding this and other issues of copyright in the digital domain, myPlay currently retains eight law firms and over 20 lawyers. Many simply to seek clarification, warn of risks, and defend against potential claims arising from the lawful use of copyrighted works by myPlay and our customers.

This unnecessary expense and resource strain would be obviated by further clarification of the Copyright Act allowing ours and other businesses to get on with the work of building a business and serving our customers.

Copyright laws should avoid needlessly placing obstacles in the way of commerce and consumer enjoyment, particularly hurdles on the most trivial of technicalities. This is particularly advisable when clarifications of the law will have virtually no effect on a copyright owner's reasonable and just expectations for compensation.

Copyright owners are entitled to and should be paid fees for public performance but not for the buffer memory copies that do nothing more than technically facilitate transmission and playback.

For all these reasons I've given, temporary buffer memory copies for lawful streaming should be explicitly placed outside the copyright owner's monopoly powers and right to demand compensation.

And just a last point. As the law now stands under principles of fair use, consumers may make backup copies for personal use unless material is encrypted. MyPlay consumers further should have the right to do the same with works that are delivered digitally and do not require encryption.

Computer hard drives crash, new ones replace old ones. Customers need the right to make archival copies for convenience no less than the lawful acquires of computer software who already enjoy this privilege under Section 117 of the current Copyright Act.

The myPlay locker service, for example, is built upon the consumer's ability to upload copies of the works they have bought either as CDs or as digital downloads.

Changes in the consumer's right to do this for digital works would violate principles of fair use, would be inconsistent with the rights afforded owners of analog physical goods, and would stifle the success of the burgeoning digital download industry.

MyPlay has played by the rules from the beginning. We've designed a service that compensates copyright owners and artists in full compliance with the DMCA and other relevant sections of the Copyright Act. There are many additional changes in the law that myPlay would desire for the sake of fair treatment beyond those under consideration today.

For apparent reasons in addition to the clarification regarding fleeting buffer memory reproductions made during the course of streaming that they not be considered reproductions, myPlay would also wish an explicit statement in the Copyright Act that downloads, that cannot be monitored in realtime are not to be considered public performances.

MyPlay is also a strong proponent of the expansion of compulsory licenses to make music more available in response to consumer demand. Such licenses should require a reasonable payment to copyright owners. MyPlay does not favor any exemption from payment obligations unlike those covered in the proposed MP3.com bill. We are not looking for a free ride. Rather, myPlay wants to ensure fair compensation.

In the meantime before these additional changes in the law become feasible, myPlay urges that at least one small but significant step be taken immediately, enhance the flow of e-commerce for which consumers, 4 million of them in our case, are now clamoring by legally precluding copyright owners' demands for redundant compensation in instances of authorized streaming that are excessive and unjustified.

Thank you.

MR. ALBEN: David, can I append one second? We are talking here about clarity under U.S. law. Streaming is a global phenomenon. We have customers of 155 million RealPlayer users. About 30 percent are outside the United States. We also face uncertainty about the status of temporary copying and the laws of other countries.

To that end it would be extremely helpful if at least U.S. law was clear so that if we were ever faced with a suit or potential suit, we would be able to point to the U.S. law and I think that would facilitate our business.

MS. PETERS: I don't think it would help you outside the United States.

Let's go to MusicMatch and Mr. Ohlweiler.

MR. OHLWEILER: Thank you very much. I appreciate the opportunity to come and testify. Given the fact that a lot of my colleagues here have talked in detail about some of the issues, one of the things I would like to spend a moment on after hearing a lot today about one of the issues that is being dealt with as a practicality is fear. As music or media is made digital, the fear of piracy.

There's a whole other side to that on the consumer side which is the promise of digital media. I want to spend a little bit of time talking about that. A little bit of time telling you about MusicMatch and how some of the things on your agenda today will impact that promise for consumer consumption and commerce of music.

First of all, MusicMatch is a company in San Diego privately held by 200 employees. About three years ago we invented a software program called the digital jukebox.

This program enables people to take their CDs, tapes, albums, record them onto their PC's hard drive lawfully, as well as take their music that they download lawfully off the Internet and consolidate their music and create an entire database of music that they own that they can then go consume.

The interesting fact and what's happened with this jukebox model is now people don't have to wade through all their CDs to listen to the exact music they want to hear. They are able to instantly in a moment's notice with a couple clicks create music that is perfect for the moment. This has removed a lot of barrier to people consuming music and it has increased the enjoyment of how people consume music.

In fact, MusicMatch does a lot of customer surveys of our user installed base and we find that people who use MusicMatch consume more music, buy more CDs, and discover more new music since using music match. We think the reason why is because it has eliminated barriers to music consumption.

So far MusicMatch is enjoyed by about 12 million registered users around the world. MusicMatch several weeks ago launched an Internet broadcasting radio service. We are also paying royalties for the composition performance as well as the recording performance. MusicMatch is now a webcaster in addition to a jukebox company.

Interestingly enough, as we've seen out consumers start to enjoy music, we've seen them eliminate barriers to that enjoyment of music. What has enabled that is this creation of the virtual jukebox or the virtual world that the Internet provides where consumers can actually just call up wherever they want the music.

They can take music along with them on a playlist on a portable device. They can burn their music onto a CD and take it to the car. They can send it or beam it to other parts of the house to consume that music.

One of the things that is very important to us as we extend that music on my PC to music via the Internet, that virtual jukebox similar to what myPlay is doing, a lot of the music now starts coming to the consumer in the form of a stream and that stream could be in a licensed webcast, it could be music that they own that they have uploaded to a myPlay service, or it could be music that comes from a subscription service on demand that they've paid for.

The interesting thing for the consumer is the consumer sees that one little piece of software that they are used to seeing that they can just grab that music wherever they're at and play it and enjoy it and experience it. They don't have to worry about did it come across the wires, is it sitting on their hard drive, is it sitting on a myPlay locker.

It's all in one simple interface. Essentially what this industry is doing is we're removing barriers to consumers to help them fundamentally enjoy their music.

One of the things that is absolutely essential to us to create this virtual world where people can listen to music through various different business models is we need to have the copyright laws be consistent with the actual transaction that's happening.

A lot of the team up here has talked about the RAM buffer issue. I would second that issue. We need to be able to pay the copyright holders for either a purchase transaction or we need to pay them for the performance. We have policies and contracts and procedures to do all of that.

What we're looking to do is as we've removed these barriers, the other issue that we are very interested in is this first-sale doctrine. The reason this is important to us is one simple reason. We think that digital media offers advantages in certain cases over physical media.

Those advantages are my ability to instantly consume that and instantly purchase it and instantly have it. That kind of impulse buy or impulse purchase or instant consumption is a very long well-known fact that when you remove barriers for consumers to purchase, commerce expands. Commerce transactions expand. People buy more. People spend more.

Record companies with their cooperative advertising dollars pay retailers to move their CDs out of the rack and put them on the end cap so that people have one less barrier in terms of walking back through the store and finding the music they're looking for in a rack. It's out on the end cap. Just to make it easier for people to access that music they have essentially removed barriers.

Digital media, what we're going to be able to do is while you're listening to a piece of music on a radio station, or while you're listening to a CD, or while you're listening to something that you are streaming, you'll be able to purchase that track instantly with one click.

That's an amazing removal of barriers for consumers to experience and enjoy music. This is why MusicMatch and other companies are so concerned about copyright laws supporting the value of digital media. Having given the consumer the same rights over digital media that they have over physical media is absolutely critical for that.

We think that, sure, there will be some piracy like there is today with people shoplifting but there will certainly be an expansion of the consumption of music because we have removed barriers to commerce.

Those are the two fundamental reasons why MusicMatch is interested in the work that you're doing. We are very supportive of copyright law. Very supportive of artists and making sure artists get paid.

As several of the other folks have said up here, MusicMatch pays royalties. MusicMatch is in the license content business and it's in our best interest that we protect the revenue streams of the artists as well.

Thank you very much.

MS. PETERS: Thank you.

Now, Mr. Nelson.

MR. NELSON: My name is Bob Nelson. Given some of the discussion I hesitate to add that I'm an attorney with Stoel Rives. Fortunately today you will hear very little about the law. I'm here to present the views of Mr. Charles Jennings, CEO, Supertracks.

I believe you have his five-page testimony before you.

He's a businessman and he's an Internet businessman. I think you see from his testimony that Supertracks has offices in Portland, Oregon and Santa Monica, California. They employ about 75 people. They are a technology company that creates and provides the technology necessary for the delivery of digital commerce using the Internet.

They focused on digital rights management for digital music downloads. They are now addressing additional areas of concern in that market as it relates to digital content delivery.

I also think for the first page of his testimony you'll see that Mr. Jennings has extensive experience with Internet privacy initiatives, authentication initiatives, and premiere content protection systems.

I will primarily briefly discuss some points in Mr. Jennings' testimony, primarily the first-sale issue which has been variously described as a privilege and right. I think that's the attitude Supertracks takes.

It is Supertracks' position and belief that the rights of consumers, which they now enjoy as a result of the first-sale doctrine in the physical world, should be extended to digital commerce by amending Section 109.

We heard today from content owners who oppose the extension of consumer rights into digital goods. Supertracks does not believe their reasons for opposition stand up against real world experience and current realities.

One of their fears is they will lose control of the content once it is put on the Internet because a digital copy is a perfectly good copy. Since a recopy is essentially an original, they feel they will lose the ability to capture value in that good. This is true if the statement is left at that point.

In reality technology is now available to protect digital goods in such a way to prevent unauthorized copying. Today it is both possible and practical to secure and protect digital goods on the Internet. There is no reason not to extend the same rights to digital goods as those in the physical world.

At Preview Systems we built a secure and robust delivery system for digital software. We proved that commerce can be conducted over the Internet, digital goods, in such a way as to protect those goods while facilitating distribution.

We are also able to do that at Supertracks where we built a similar secure and robust delivery system for the digital download of music. Digital copies have as much, if not more, copy protection as the same song delivered on a physical medium such as a compact disk.

In fact, it is even possible to provide greater copy protection of the digital world, which if used as a standard could paradoxically lead to an erosion of the rights and protections afforded consumers for physical goods.

Using the analogy we discussed previously of reproducing a book, I think it is our position that it is more difficult if you have the forward and delete methodologies. I noticed Mr. Sherman referenced those.

It is more difficult to reproduce those works in violation of the valid purposes of the copyright law than it would be to reproduce a book via a Xerox machine.

Legally when digital goods are treated differently from physical goods, it allows content owners to apply different rules to those goods, rules that have a direct negative impact on consumers.

These differences are not consumer friendly and the rules imposed by content owners are often hostile to consumers. I think we had extensive discussion this afternoon by Pamela Horovitz on this very point.

Consumers expect to have the same rights of ownership they have with physical goods. We found that they don't understand why they can't do the same thing with the digital goods as they could with the same product in a physical format.

Why can't they lend it, resell it, make a copy to listen to in the car? Especially when the digital product can be designed to allow for those abilities. Why don't they have the same consumer protection rights as they would have with music they bought in some other form.

The key to digital commerce is acceptance by consumers. Consumers won't accept digital commerce until it is ubiquitous, easy to access, and can be used, consumed, in a manner that is satisfying.

They don't have the same rights with digital goods as physical goods markets. I would emphasize here, markets by responsible providers are unlikely to develop. Consumers won't buy digital goods if restrictions put on digital downloads cause the buying experience to be cumbersome.

We've had this experience at Supertracks. We built the software and infrastructure but no one came to buy the music. The reason was simple. Consumers found the experience too restrictive and cumbersome.

This experience is not unique to Supertracks. It is experienced by the industry as a whole. As Mr. Sherman pointed out, we are all struggling with a common goal here, to make it available in a way that is not restrictive and cumbersome. We are finding the same thing in other forms of digital delivery as well.

Current law makes it extremely difficult to give the consumer a rich experience that will encourage purchases. When they purchase a digital good, current law does not extend the kind of protections that make it a worthwhile investment.

As a result, they refuse to buy music under those conditions. If consumers aren't buying, there is no market. Without a market, content owners won't be paid for a product they have a right to sell. Everyone loses.

We would like to briefly turn to the other issues that we've been discussing, the archival copy exemption. Again, we think that consumers should be able to move or store music they have purchased through other personal non-commercial devices.

They should be able to protect their investment by making archived copies for personal use whether or not these copies are susceptible to destruction by mechanical or electric failure.

In the physical work they already have this right. In the digital world they don't.

I think that summarizes the comments that Mr. Jennings has submitted for the record. I have additional complete copies of the comments and, of course, the summary if anyone wants one. Given the lateness of the hour, I think I'll conclude. Thank you very much for your attention.

MS. PETERS: Thank you.

I thank all the members of the panel.

I'm going to start with you.

MR. CARSON: Cary, let me make sure I understood what you were talking about, what your position was with respect to the buffer copy.

If I understood correctly, you were saying that legislation isn't necessary because it's not really a problem in the real world. Nobody is asserting infringement or no one has been sued for infringement and so on.

I don't think I heard you say -- I'm not sure I heard you take a position on whether in fact the making of those buffer copies incidental to a streaming transmission is or is not an act of infringement. Do you have a view on that?

MR. SHERMAN: I hesitate to take any position that is a one size fits all position on something that is as broad as the phrase "temporary copies," "buffer copies," or whatever.

Is a buffer copy accessible? Is it available for a millisecond or is it available for 24 hours? Every time we have some provision in the copyright law, there is some new company that comes along the following week that will take advantage of that exemption and try to squeeze a business model in that avoids payments to copyright owners.

Should copyright owners be paid for nonvaluable things that have no merits? No. But how can you decide that on an all or nothing basis with a phrase like "temporary copies"? I really think you need to look at these things on a case-by-case basis and make a decision that's based on the merits. I think that is the only logical way that we can approach something like this.

We may be a little gun-shy about changes to the copyright law here. We have seen what happens when well-intentioned and very clear changes to the copyright law in the consumer interest are then taken by lawyers to court and stretched beyond recognition to achieve ends that nobody intended.

The clearest example of that is the recitation about Section 1008 of the Audio Home Recording Act. Napster argued that it wasn't meant to protect personal copying by individuals, but that it was intended to allow world-wide distribution of copyrighted works to strangers.

I mean, it's that kind of stretching that we have to be legitimately concerned about, and trying to come up with a provision that is going to apply to all temporary copies in some logical way--without taking account of the multitude of circumstances that can arise--is very difficult.

I really just don't think we are going to be able to get it right. I don't think we're smart enough to know what's going to come along next month that will make us seem foolish for what we did last month.

Marybeth has made the point that nobody envisioned Napster when we were all talking about the DMCA. That is certainly true. Think of how differently we might have tried to work on those safe harbor provisions if Napster was the model.

Well, Napster is now not just a model. It's a very potent force. Yet, nobody envisioned it. I think, therefore, we have to be very, very careful about making changes.

I would also like to take the opportunity to respond to David Goldberg on his point that there is a real world issue with temporary copies.

I think what you are referring to is not temporary copies per se, but a specific provision of the copyright law called incidental DPDs. That is really what a lot of the people at this table are talking about, incidental DPDs.

One could look at it, yes, as a form of temporary copy but it would stand regardless of whether we enacted a temporary copy exception because there's a specific provision dealing with incidental DPDs.

I would, therefore, suggest that we have to resolve that issue. As you know, we have filed a petition with the Copyright Office asking for the help of the office in figuring out how that should work. It's a tough issue.

MR. GOLDBERG: Actually, specifically the temporary buffer in the stream has been -- that specifically what has been used against us.

MS. PETERS: By music publishers?

MR. GOLDBERG: By publishers. By publishers demanding payment for mechanical license for that temporary buffer.

MR. SHERMAN: That's an incidental DPD. That's what we're talking about. That claim comes within the context of incidental DPDs within Section 115. We all know that's an issue that needs to be addressed.

MR. ALBEN: I respectfully disagree because we have seen that described separately and incidental DPDs could cover other kinds of ephemeral copies; copies on servers, copies created in transmission. In fact, I have never seen someone try to apply that section only to the temporary RAM buffer.

MR. SHERMAN: Well, I think David will disagree with you.

MR. CARSON: Just one more question. As I've heard all the testimony about buffer copies and so on, I've asked myself whether this question is properly before us.

I look at Section 109 of the DMCA and what I see it tells us to do is to examine the effect of the amendments made by the DMCA and the development of electronic commerce and associated technology of the operations of Section 109. That's the first sale-doctrine. I understand that.

And Section 117. Section 117 is not an all purpose copying exemption. Section 117 is a section that deals with computer programs and what one can or can't do with computer programs.

Why are we talking about this today? Is this within the mandate that Congress gave us in conducting this study?

MR. ALBEN: The RealPlayer is a computer program. RealPlayer employs the technology that is RAM buffer. I think the law is unclear right now as to whether any RAM buffer copy is a copy that would be an infringement.

I'm disappointed that Cary would not at least acknowledge that the industry standard that's being used, the RealPlayer, but also the Windows Media Player and Apple Player that use the exact same type of technology. I'm disappointed that he would not go so far as saying that the buffer copy as employed in that specific type of product is not an infringement.

(Whereupon, the lights go out.)

MS. PETERS: Oh. Well, that's

interesting.

MR. ALBEN: So literally we're in the dark and we would like some clarity. Let's face it, you had a gentleman who is someone with an advanced degree in law today in the previous session state to you that a transmission is a performance even though it is never heard.

I think there is a lack of clarity in a lot of these issues that you're going to be grappling with in a number of rulemakings and a number of proceedings. I think it would be very valuable to add some clarity in the law. A download is a download if it's reproduction unless it is simultaneously audible to the user. And a stream is a stream unless a permanent copy results from that stream.

I sort of feel like we've been through the looking glass today because the performance societies will say that a download is a performance and the reproduction societies that collect that royalty will then tell you that a stream is also a reproduction.

Well, these two things can't be true. They are not logically consistent. He said they were not intuitive but I think the proper word is they are not logical and they are not born out by the law.

The only reason why I digress on that

right now is that you are going to face this issue in other rules and proceedings and we should try to get it straight. The more clarity that we can have, the more we can move forward with our businesses in a robust way.

MS. PETERS: Can I add to your question to Cary? We had a witness from NARM who was reading from a contract and she characterized -- it was a record company. She didn't identify the record company but she characterized the product as software.

My question was when record companies in their contracts use the word software, are they referring to what we recognize as software or is there kind of a move to call content software?

MR. SHERMAN: I honestly don't know how it was used in that context. It is conceivable that there would be a distinction drawn between the musical content and the software program that provides the functionality for the replay and any DRMs and so on and so forth. I don't know how it might have been used in that context but I don't think there is generally a move in the industry to call content software.

Unfortunately, Alex, Section 117 refers to computer software not in the broad context but in the context of a computer program. What you are worried about buffering is other kinds of copyrighted works, other than computer software programs, even though it may be happening inside a computer program.

I think, David, you're right.

MS. PETERS: Jesse.

MR. FEDER: Given the lateness of the hour I want to give Jeff a chance.

MS. PETERS: Jeff.

MS. PETERS: I think we're all burnt out.

Marla, did you have anything?

MS. POOR: No.

MS. PETERS: Let me make sure. I just want to make absolutely sure. I think actually any question that I might have I can pull and get further clarification. It's okay.

I want to thank everybody who participated as a witness. I also want to thank all who were in the audience for your long-staying ability in not necessarily the most pleasant of circumstances and surroundings. We appreciate that. Thank you.

(Whereupon, at 6:04 p.m. the meeting was adjourned.)

Appendix 1

"The Library as the Latest Web Venture"
New York Times, June 15, 2000

Technology | Circuits The New York Times ON THE WEB

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June 15, 2000

The Library as the Latest Web Venture

By LISA GUERNSEY

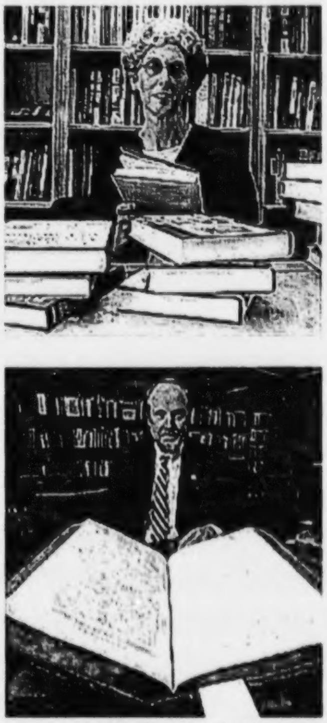
When Carrie Larkworthy, a student at Harvard University, is faced with a research project, getting a book out of the library is the last thing on her mind. Instead she sits in her dormitory room and logs onto the Web, starting with Harvard's online system for searching and retrieving journal articles. "I hate the library, so I try to avoid it," Ms. Larkworthy said. "It's such a big facility that you have to search through."

If Ms. Larkworthy's experience is anything like that of other students, and many librarians acknowledge that it is, the use of books for research is becoming an archaic concept. If scholarly books are not on the Web, they are invisible to anyone using the Internet as a substitute for in-depth investigation.

But new efforts are afoot to change that. Several companies are racing to put the full texts of hundreds of thousands of copyrighted books, old and new, on the Web.

NetLibrary started the contest, with technology that lets people view books online for short periods of time, the digital equivalent of borrowing them from the library.

Now two other companies, Ebrary.com and Questia Media, are taking on the same challenge but using a new strategy. They want to give people the



Jennifer Warburg for The New York Times, top; Andy Manis for The New York Times, bottom

FROM BOOKS TO BYTES - Kate Douglas Torrey, top, is director of the University of North Carolina Press, which is working with Questia Media to put many of its books online. Questia and another service, Ebrary.com, will charge their customers. Kenneth Frazier, bottom, of the University of Wisconsin at Madison wonders how digital libraries will affect actual libraries.

Related Article

- Foreign Shores Provide Cheap Labor to Digitize Books

opportunity to search through reams of pages at no charge, then will charge people a few cents a page for using that information. (Questia users will be asked to pay for viewing, copying and printing the online pages. Ebrary.com users will be able to view pages free but will pay for copying and printing.)

These electronic library projects are not attempts to compete with the budding electronic book industry, which offers books for downloading to handheld devices and is focused on popular fiction, like Stephen King's recent Web-only novella, "Riding the Bullet," and on other newly published trade books. The library projects have very little to do with the debate over the promise or pitfalls of gadgets that let people read novels electronically from the comfort of their beds.

In fact, the new effort to build an electronic library is not about reading at all. It is about the power of electronic searching. With digital scanning, texts of works that may be decades old can be mined for those few morsels of insight that may enhance a research paper or help prove an argument. It could be a way, some publishers say, to move books into the Web's fold and make them more visible to students like Ms. Larkworthy.

"In an ideal world, a person would find a book in the card catalog, pull it off the shelf and use it," said Kate Douglas Torrey, director of the University of North Carolina Press. "But that is just not the world we live in today." The University of North Carolina Press is among more than 80 publishers working with Questia to turn many of their titles into searchable documents available on the Web.

Laziness is not always the excuse for avoiding the traditional library. Even people who do go hunting in the stacks are sometimes thwarted. The books they want might be checked out or misplaced, lost forever among call numbers that have no relation to the sticker on their spines. Or the books might be at other libraries and available only to those researchers who are willing to wait weeks for interlibrary loans.

Such situations can be avoided on the Internet, proponents of digital libraries say. "This will take some of the tedium out of research," Ms. Torrey said, "and make it easy to use an extensive collection of scholarly work."

Of course, people have been hailing the promise of digitized libraries for years, and the reality has not yet measured up. When netLibrary opened in March 1999, for example, it was promoted in press releases as a company that would "revolutionize the library system" by enabling people to tap into a searchable and comprehensible database of reference and scholarly books.

Until this month, netLibrary offered two types of access: holders of library cards from participating libraries could use the service at no charge, and others could subscribe to the service for $29.95 a year. The subscription option is no longer being offered to new users.

Now netLibrary is primarily a service for public, academic and corporate libraries that want to buy electronic titles and make them available to their patrons.

Rob Kaufman, netLibrary's president and chief executive, said the shift away from a consumer service was partly an attempt to appease librarians and publishers. Some librarians said the service was competing with them. Publishers did not like the subscription model for another reason: they said it gave people too much access to electronic texts at too low a price.

Even those who gain access to netLibrary may find the experience less than satisfying. There are just not yet enough books in the site's collection to make serious searching worthwhile. The site now has about 18,000 copyrighted books and 4,000 public-domain works, numbers that are tiny compared with the hundreds of thousands of volumes in most research libraries and the millions of volumes in major ones.

Will companies like Questia Media and Ebrary.com do any better? Ebrary.com already has more than 130,000 volumes in its demonstration database and says that it may include as many as 600,000 by the time it opens in the fall.

Questia, backed by $45 million in venture capital, plans to offer access to 50,000 volumes when it opens next spring and is working toward a goal of 250,000 books in three years.

These numbers are possible, the founders say, because they have appealed to publishers' pocketbooks. When a book is sold to an actual library, the publisher makes a one-time profit. That book might be retrieved and read by hundreds of people, but the publisher never sees another dime. In the models used by Questia and Ebrary.com, however, that book could continue to make the publisher money as more people see it.

Anyone going to Questia's site, for

SITE-SEEING

Although commercial companies are getting into the act, several education Web sites have been offering access to electronic texts for years. The sites are ideal for finding classic texts that are not restricted by copyright, like works of Shakespeare or Robert Frost. Most of them are plain text versions of books and are not integrated into Web-based databases, which means that they do not allow keyword searching across multiple volumes. Here are some of the sites that give people access to texts of literature and reference works:

ALEX CATALOG OF ELECTRONIC TEXTS:
sunsite.berkeley.edu/alex
Includes about 700 books that are in the public domain, which typically means that they have been written by authors who died decades, if not hundreds of years, ago. Titles are drawn from American and British literature and Western philosophy.

BARTLEBY.COM:
www.bartleby.com
Features a searchable database of

Anyone going to Questia's site, for example, will be able to search the entire database of books at no cost, but only subscribers will be able to see the books' pages by clicking on the search results. (Questia has not yet set its subscription price, but Troy Williams, the company's chief executive, said that it would be "affordable for the average college student.")

Ebrary.com has adopted what Christopher Warnock, the chief executive, calls "the photocopier model." Searching will be free, he said, and so will the act of simply reading whatever pages are retrieved from a search. But when a person tries to copy the text of those pages by using copy and paste commands, a dialogue box will appear on the screen. In a recent demonstration, the box said: "This will cost you $0.25. Would you like to continue?"

about 100 books, most of which are multivolume reference books or classics of literature and poetry. Although the site is now commercial, it started as a university project and access remains free. The company is starting to include copyrighted books as well, like The Columbia Encyclopedia, Sixth Edition.

ELECTRONIC TEXT CENTER:
etext.lib.virginia.edu/uvaonline.html
Offers about 5,000 public-domain texts, including English literature, manuscripts and newspapers from 1500 to the present. Also includes texts in more than a dozen other languages.

PROJECT GUTENBERG:
promo.net/pg
One of the first electronic text projects on the Internet, this has about 2,500 public-domain titles.

The same kind of message pops up when a user tries to print the page. If the user decides to pay for copying or printing, the software will automatically generate a citation for the work and place it below the copied or printed text.

Most people will have no problem paying a few cents for what they want, Mr. Warnock said, since they already scrounge up quarters to use photocopy machines. At the site, a user will be able to sign up for a debit account of, say, $10 and will then need to type in a user name and password during each session in which the user prints or copies pages.

These payments, the founders say, can add up to big money when millions of people are spending a few cents at a time. And many publishers are willing to license their copyrighted material in exchange for some of that cash. "It holds the promise of being profitable," said Tim Cooper, vice president for strategic operations at Harcourt Trade Publishers, one of the companies that has signed a letter of intent with Questia.

It is not just those micropayments that interest publishers, said Larry Weissman, director of new business development for Random House, which, he added, has struck no deals with either Questia or Ebrary.com. But the ideas are appealing, Mr. Weissman said, partly because they may introduce readers to new works. "The hope is that they would want to continue that reading experience by buying a book," he said.

If the sites succeed, they will be mixing the qualities of libraries and bookstores. Most people think of the bookstore as a place to buy and the library as a place to borrow or browse at no charge. But on the Internet, where full texts can be searched in seconds and information can be retrieved with a few clicks, convenience is part of the package as well. These companies, including netLibrary, are betting that people will pay for it.

Librarians are intrigued by the concept, said Kenneth L. Frazier, the president of the Association of Research Libraries. And they are eager to see how quickly texts can be digitized when put into the hands of companies, which may find more efficient ways to scan books on a huge scale.

But Mr. Frazier, who is director of the general library system at the University of Wisconsin at Madison, also wonders what that will mean to traditional research libraries, which have always been motivated by public interest, not private profits. Making sure that low-income people have access to expansive new online libraries is one area of concern. Another concerns the selections made by digital libraries. Will databases include only the most popular books, Mr. Frazier asked, "or the stuff that gets the highest return economically?"

At Ebrary.com, books are included for technical reasons. They must already exist on publishers' computers in a format called PDF (for portable document file), which was developed by Adobe Systems and is commonly read online using the Adobe Acrobat Reader. Many publishers, Mr. Warnock said, have been using this format since the early 1990's during the design of their hard-copy books.

Questia is taking a more academic approach. It has hired Dr. Carol Hughes, a research librarian who recently worked at the University of Iowa, to lead a team of librarians in selecting core titles that have been known to be useful to college students. A few of the books that will be included on Questia are "The Industrial Revolution," a 1956 book by Arnold Toynbee, and a 1982 edition of Dante's "Divine Comedy."

Dr. Hughes said she suspected that Questia might drive more students to the actual library instead of away from it. After using the Web to find books that meet their needs, she said, they may want to check them out to read them more closely. "I think it is going to greatly enhance libraries," she said.

Being able to search online books will help students see their value, Dr. Hughes said, particularly when they can easily get access to books that have become classics in particular subject areas.

A nonprofit project called JStor is often offered as proof that digitizing old texts can breathe life into them. For the past five years, JStor has been creating digital copies of scores of scholarly journals, some of which have issues more than 100 years old. University libraries around the world pay for access to JStor and provide it to their students free. A recent study by JStor showed that students used the online service almost 20 times as much as they dug into the stacks for the paper versions.

Just a few years ago, said Mr. Frazier, of the University of Wisconsin, librarians and publishers scoffed at the idea that a full-scale project like JStor could be adopted for books any time soon. Many people said it would take centuries before the equivalent of a library's bookshelves would ever make it onto the Web.

But now that Mr. Frazier has seen and heard about new efforts, he said, "I'm not so sure about that anymore." "I think this might happen much more quickly than we might have imagined a few years ago," he added. No longer, he said, will books suffer from what he called that "fatal disadvantage": the fact that they are available only in print.

Related Sites

These sites are not part of The New York Times on the Web, and The Times has no control over their content or availability.

- Ebrary.com
- Questia Media
- netLibrary

Ask Technology questions in Abuzz, a new knowledge network from The New York Times. Get answers and tell other readers what you know.

abuzz

YOU WANT EVERYTHING WITH THAT?
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Appendix 2

"The Library as the Latest Web Venture"
New York Times, November 27, 2000

Technology

The New York Times ON THE WEB

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November 27, 2000

Struggles Over E-Books Abound

By DAVID D. KIRKPATRICK

There is something not entirely rational about the book industry's current love affair with electronic books. Few people have ever read a whole book on a screen. No one knows how many people will ever want to. And book publishers have been burned before: A decade ago, book publishers produced thousands of electronic books on computer discs with game-like interactive features, pictures and sounds, but consumers were not interested.

Christopher Berkey for The New York Times

Cheyenne White inspected a volume at the Ingram Book Group's Lightning Source printing unit in LaVergue, Tenn.

Nevertheless, major book publishers, technology companies, online booksellers and new electronic book middlemen are betting hundreds of millions of dollars this year on the future market for digital books. In the latest twist, the media and technology company

BEST COPY AVAILABLE

Gemstar-TV Guide International is in talks with the nation's largest bookstore chain, **Barnes & Noble**, about a range of ventures that may include a merger or acquisition, a deal that would make sense only if electronic books became a truly significant business.

What is the rush? Absent a clear sense of the future, digital publishing has become a Rorschach test for the book business. Authors, publishers and booksellers see in digital books their own fantasies and nightmares, usually shaped by the antagonisms of decades past. Their cherished hope is that electronic books will open new markets and create new sales for their books the way that early paperbacks did in the 1930's. After decades of bruising battles among agents, publishers and booksellers over the stagnant revenue from slow-growing book sales, no one wants to see their rivals get a jump on them.

Related Articles
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- Citing Stephen King, Netlibrary files IPO (August 18, 2000)
- The Library as the Latest Web Venture (June 15, 2000)
- Making E-Books Easier on the Eyes (February 3, 2000)

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Already, the battles over the structure of the nascent digital book business are taking shape as industry players race to stake their claims in the new territory, often on overlapping turf. Authors like Stephen King see electronic books as a way to sell books directly to consumers, freeing them from dependence on publishers. Publishers, in turn, see a chance to cut out printers and even bookstores: they are printing books in their warehouses from digital files and selling electronic editions to interested readers on the Internet. In return, online booksellers like **Barnesandnoble.com** are moving into the publishers' business, printing digitized books themselves and selling their own electronic editions. Meanwhile, a handful of fast-growing start-ups are racing to sell the contents of books in an entirely new way, through huge digital archives of thousands of books and periodicals available online, liberated from the confines of their covers.

The industry's ultimate nightmare is that digital books will go the way of digital music: circulating for free over the Internet, at the mercy of pirates and hackers. To ward off publishers' fears, a host of technology companies are jockeying to insert themselves into digital publishing as profitable middlemen, taking the place occupied by distributors of traditional books. They provide protection from copying along with elaborate software and services to store and transmit digital books, in exchange for a cut of book sales revenue.

In short, everyone at the table has an eye on someone else's plate, even before the food has arrived. Some think it could be a long wait. Daniel O'Brien, an analyst who studies electronic books for Forrester Research, calls electronic books a solution in search of a problem. "Our research with consumers indicates very little interest in reading on a screen," he said."Maybe someday, but not in a five-year time frame. Books are pretty elegant."

Still, many in the industry are more sanguine. "Publishers are by nature optimists," said Jack Romanos, president of Simon & Schuster, one of the first traditional publishers to begin selling electronic books. "The logic of electronic books is pretty hard to refute — we see it as an incremental increase in sales as a new form of books for adults and especially for the next generation of readers. The publisher's ultimate responsibility is to get the work to the greatest possible audience, and this is one more swing at the plate."

Authors vs. PublishersDividing the Take

In a Zero-Sum Game

Whenever two or more authors are in the same room, the conversation eventually turns to the failings of publishers: low advances, stingy marketing, hasty editing and, most of all, rejection letters. On the other hand, publishers complain that authors are unrealistic, squeezing their profit margins to the bone by demanding enormous advances on their royalties.

Their continuing tug of war has turned into one of the pivotal opening skirmishes over the future of electronic books. Authors, and would-be authors, were among the first to seize on digital technology as a way around traditional publishing's onerous printing and production costs. Confounding the expectations of the established houses, a few frustrated authors have even managed to turn a profit by publishing other writers' electronic books — selling other publishers' rejects with almost no marketing.

Hard Shell Word Factory, for example, an electronic book publisher run by a former aspiring romance writer, sells about 6,000 electronic books a month, usually downloaded for about $5 apiece, from an online catalog of roughly 200 romances, mysteries and science fiction novels. **Booklocker.com**, run by another writer, sells about 1,200 books a month for $10 to $15 each, many of them popular novels and how-to books. Stephen King made headlines when he self-published his electronic serial novel "The Plant."

Random House took the potential for new authors to publish online seriously enough that it acquired a stake in **Xlibris**, an author-financed digital publisher that now issues more books in a year than Random House. But publishers say they are not worried that big-name authors will try to go it alone any time soon. "They will ultimately figure out that many aspects of electronic publishing — the customer service, the transactions, billing, collecting — are not all that interesting, not all that simple and pretty time consuming," said Mr. Romanos of Simon & Schuster, a unit of Viacom that publishes Mr. King.

But the attention to Mr. King's electronic experiments has revived a long-running battle between authors and publishers over how to split the putative proceeds from sales of digital books.

After the success of Mr. King's novella, **Bertelsmann**'s Random House subsidiary, Simon & Schuster and **Time Warner**'s book division fanned out to agents around New York to make deals for digital rights. Only in recent years and only with mixed success have publishers pushed to obtain the rights to digital editions in their initial contracts for authors' books, so most digital rights were retained by authors and agents. To complicate matters, publishers looking for digital rights sometimes poached authors from rival houses, signing deals to publish electronic versions of other publishers' printed books as Time Warner did when it published a digital edition of James Gleick's "Faster," originally by Random House's Pantheon imprint.

But as publishers and agents settled into their tables at industry hubs like Michael's and the Four Seasons, neither side knew where to start. There is no industry standard for compensating authors for the digital versions of their works. Should authors receive 10 percent of the cover price, as they do on the first sales of their hardcover books? Authors' agents pushed for far more, accusing publishers of trying to grab the savings from eliminating printing or distribution costs.

When Random House introduced its first digital book imprint, it initially signed deals paying authors a royalty on electronic books of 15 percent of the retail price. Time Warner used a different formula — a quarter of the publisher's revenue, which comes out to about 12.5 percent of the retail price in the customary arrangements with booksellers. Simon & Schuster signed deals for a variety of rates around the same range. (No one knows how much to charge consumers for an electronic book, either. Some publishers are setting prices for electronic books just below their printed equivalents, but others charge hardcover prices for some electronic editions.)

This month, however, Random House startled the industry by essentially capitulating to its authors' demands. Random House announced that it would split equally with authors the wholesale revenue from selling or licensing their electronic books — effectively raising the author's share of the list price to 25 percent from 15 percent under the current arrangements with booksellers.

Random House executives even hinted that online booksellers might also lower their cut of the retail price for electronic books, which would further increase the author's take.

Other major publishers scoffed in disbelief. As the largest English-language publisher, Random House has a considerable impact on the market for manuscripts. But the major publishers' digital initiatives are deep in the red, spending heavily on technology with few sales to show for it. So far, none of Random House's rivals have matched its 50-50 revenue split. "I don't think that 50 percent to the author gives the publisher a chance to breathe," said Laurence Kirshbaum, chairman of the book division of Time Warner, another major electronic- book publisher.

Random House executives say the company's decision was as much a defense against potential future threats as a response to the current state of affairs. They wanted mainly to be sure that no one else stepped ahead of them in the race to figure out the potential new market. And Random House especially wanted to keep rivals from making deals with its authors. A few small start-ups, without the marketing resources of a major publisher, had offered authors a similar 50- 50 split. More threateningly, Barnesandnoble.com executives have discussed similar arrangements with agents as the company considers its digital publishing plans.

Booksellers vs. PublishersSeeking to Shorten

The Supply Chain

Publishers and bookstore chains have been stuck in a bad marriage for decades. Publishers have privately complained for years about the superstore chains, resentful of the power of their buying and merchandising decisions and bitter about the fees they charge to promote books in their stores and advertisements. Big booksellers, on the other hand, retort that it is publishers who hold the power, since they decide what to publish, control the copyrights to popular books and set cover prices.

After years of feeling captive to bookstore chains, publishers have quietly seized on electronic books as a way to sell directly to consumers. Random House, Time Warner's book division and Simon & Schuster have all taken steps in that direction.

"Digital publishing presents an opportunity for publishers to have a much closer connection to consumers," said Mr. Romanos of Simon & Schuster. "I don't believe we will not have retailers, but certainly the middleman component will be a smaller one."

Some publishers are already selling digital books directly to consumers by offering customized editions with mix-and-match contents, especially in the educational publishing market. This fall, **McGraw-Hill**'s Primis Custom Publishing division created a Web site to let professors select chapters and excerpts from an archive of books and other texts to build their own personalized electronic volumes — ordering directly and sidestepping campus bookstores. Guidebook publishers have similar plans.

Random House's Modern Library classics division plans to sell electronic editions of its books directly to readers through links to literary Web sites like those devoted to Shakespeare or Jane Austin. Time Warner will begin selling its electronic books through links to its own Web site early next year, although Mr. Kirshbaum, the Time Warner book division chairman, plays down the threat to its biggest customers. "The Barnesandnoble.com's of the world are going to be our meal ticket for some time to come," he said.

Barnesandnoble.com plans to return fire by publishing and printing its own digital books. Beaten to Internet bookselling by **Amazon.com**, Barnesandnoble.com has spent heavily to be ahead in the business of selling and publishing digital books.

Barnes & Noble and its sister company Barnesandnoble.com have invested in several digital publishing and bookselling start- ups, including buying Fatbrain.com and acquiring major stakes in **iUniverse** and **MightyWords.com**. MightyWords, a publisher and online retailer of digital books, has provoked Simon & Schuster's ire by trying to publish works by its authors; Simon & Schuster retaliated by excluding MightyWords from selling copies of Stephen King's popular electronic book, "Riding the Bullet."

Barnesandnoble.com and Barnes & Noble are also becoming digital printers and publishers themselves. The companies have installed print-on-demand equipment in their warehouses so that early next year they can begin printing and binding their own copies of books available from publishers as digital files, cutting out the printer and distributor. Publishers such as the **Perseus Books Group** and distributors, notably the **Ingram Book Group**'s Lightning Source, have also installed print-on-demand equipment, and will compete over where in the supply chain the printing takes place.

Michael Fragnito, a former publisher of Viking Studio Books and senior vice president for production at Viking-Penguin, was hired in May to jump start Barnesandnoble.com's digital publishing program. For years, Barnes & Noble has printed its own list of classics and other books with expired copyrights for sale in its stores, often annoying publishers by undercutting their prices. Now, BarnesandNoble.com is moving aggressively into the unknown terrain of digital books. At the very least, Mr. Fragnito, said the company planned to sell thousands of books with expired copyrights as digital books and might add electronic versions of newer books, too.

Amazon.com, which recently opened its own electronic bookstore, has challenged publishers on other fronts, by offering access to its customers and its transaction services to authors who want to self-publish either print or electronic editions. The authors M. J. Rose and Seth Godin have both made names for themselves by self-publishing through Amazon.com.

Dueling ArchivesSetting Up Shelves

In Virtual Libraries

At least three start-ups are currently racing to build an alternative way to sell the contents of digital books, as part of large online archives that let readers search through texts as well as browse their titles. Each of the main contenders is pursuing a different strategy, but they are competing fiercely for publishers' digital books because the biggest collection will have the greatest appeal to readers.

NetLibrary, the best-established for-profit digital archive, this summer filed preliminary plans to test the stock market's enthusiasm for electronic books with an initial public offering, which it has not yet made. Its main business is selling electronic books to libraries, with online access to a copy of the book on NetLibrary's computer servers for either an annual or one-time fee. A library's patrons can search through the contents of all the books in that library's online collection from any location, although only one patron can use a title at a time. Users cannot copy or print books, either — a key point with publishers worried that too much access could hurt book sales.

So far, more than 70 public libraries, including New York's, have signed up, along with more than 1,000 university libraries and a few corporations like Sun Microsystems and Disney. NetLibrary's total catalog of books now stands at 32,000 from 250 publishers, including Oxford University Press and John Wiley & Sons. In the third quarter, NetLibrary passed along to publishers about $2.2 million from sales to libraries of their electronic books.

Neither of its competitors, companies called **Questia** and **Ebrary**, are currently operating, but both are frantically striking deals with publishers to enlarge their own collections. Questia, founded two years ago, will open for business in January. It hopes to sell to students access to the contents of an archive of digital books for a subscription fee for $20 to $30 a month. Its service also comes with a variety of research software, like links connecting footnotes in one book with text in another. Its biggest advantage is its collection of 50,000 books from a variety of academic and educational publishers and the pile of over $130 million in cash it has raised. Questia plans to pay 5 to 10 percent of its subscription fees to publishers, divided according to how much their books are used.

Ebrary, the third contender, took a leap forward this fall when it simultaneously sold minority stakes to three of the biggest English-language publishers — Random House, McGraw-Hill, and **Pearson**'s Viking- Penguin. All three now have an incentive to help

Ebrary succeed.

Ebrary plans to be part archive, part showcase for publishers. Aiming for general readers as well as researchers, Ebrary's system lets readers search and browse for free through an online archive of digital books and magazines. But publishers can restrict access to 20 percent at a time of certain books, and they can set prices for consumers to pay to print pages, copy sections or download electronic books. Ebrary says it will pass 60 percent of its revenue to publishers. And Ebrary provides links to several online retailers so customers can buy the old-fashioned printed editions — publishers' main business.

The Software RaceIf They Do Read,

How Will They Do It?

Perhaps the most visible contest over the future of digital publishing is the heated competition among three technology companies hoping to set the standards for publishing and reading books on screens. **Microsoft**, **Adobe Systems** and Gemstar-TV Guide International are all rushing to convince publishers and readers that their format is the most secure from copying, convenient to use and the easy on the eyes. To publishers' delight, they are also spending lavishly to promote their rival systems, often promoting authors and books in the process.

Adobe Systems has by far the largest share of the digital publishing software market. Customers have downloaded over 180 million free copies of its software for reading and printing digital documents. Adobe also recently acquired technology to make digital type easier to read. But Adobe has recently fallen behind in the rush to make deals with book publishers and attract new readers.

Microsoft's greatest strength is its enormous resources as the dominant provider of computer operating systems. It has campaigned aggressively for public attention. But it was just this summer that it released its software for reading electronic books on desktop computers, making it a relatively late entry into the market.

Microsoft and Adobe provide similar systems for seling electronic books. Customers download a digital file over the Internet, and the software maker receives about 3 percent of the book's retail price.

Henry Yuen, founder and chairman of Gemstar, has a different plan. Unlike his rivals, his company holds patents on the technology to read digital books on specialized hand-held devices. Mr. Yuen is betting that these devices, easily portable with lower prices and high-quality screens, will appeal to consumers more than expensive personal computers or small personal digital assistants. But Gemstar's devices are not cheap yet. The latest generation, built under the RCA brand by **Thomson Multimedia**, is appearing in electronics stores this week at the lofty price of about $300.

Mr. Yuen's pitch to publishers preys on their fears about Internet hackers. "The reality of the matter is that you cannot put things on the Internet — I don't care how strong the encryption scheme, it is going to be broken one way or the other," he said.

Gemstar's system avoids both personal computers and the Internet all together. Online bookstores sell electronic books for Gemstar's format, but to download the digital texts consumers need to plug their hand- held devices into phone lines and dial directly into Gemstar's central computer servers. As exclusive distributor of electronic books for its format, Gemstar will collect a hefty 15 to 20 percent fee on each sale.

Gemstar's system also means that users of the devices will store and retrieve all their books on Gemstar's computer server. Mr. Yuen hopes to sell advertising they will see while they are there, and Gemstar may sell them electronic books directly, too. He plans to enable them to shop through his devices by downloading catalogs, making a commission on each sale.

Eventually, Mr. Yuen envisions devices built with Gemstar's electronic book reading patents to blossom into personal organizers, wireless pagers and phones and generalized portable entertainment devices for text, video and sound. "I would like this particular well-documented habit — reading — to be my entry into the consumer mobile-device arena," Mr. Yuen said.

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Appendix 4

Sony Music Entertainment Inc.
License Agreement

(as contained in the file readme.txt on
"The Writing's on the Wall" CD)

[readme.txt]

Using your Sony CDplayer

Windows '95:
After inserting this audio disc in your CD-ROM drive a "destiny.exe" window will appear.
If your computer is not set to "Autorun" the "destiny.exe" dialog box will not appear. Set your computer to Autorun or double-click on "destiny.exe".

Note windows 3.1 users:
The "destiny.exe" isn't supported on win3.1.

Minimum Requirements

* Intel Pentium processor or compatible.
* 16 MB RAM
* Microsoft Windows 95
* 640 x 480, 256-color (8 bit) display
* Double speed or faster multi-session CD-ROM drive* with Enhanced CD compatible firmware
* 16 bit sound card

*If you are unsure of your CD-ROM drive's capabilities, please contact your hardware manufacturer to verify that your drive contains Enhanced CD (Blue Book/Multi-session) compatible firmware.

Troubleshooting:

Sound Problems
1. Is your volume turned up? Are your speakers plugged in?
2. Do you have a Sound Blaster compatible sound card that can handle 8-bit, 22K sound? Is it installed properly in Windows? Try using another piece of software to play sound within Windows.
3. If you have a mixing control panel, check that the levels are not set to zero.

Video problems
1. Is your monitor set at 256 colors (8 bit color) or above? If not select the Windows Control Panel, click on the display tab for Windows 95 to change the monitor settings.
2. In order to view video you must have the video for windows installed. If you do not check in your original Windows installation disc for the installer.

Online problems
1. Do you have a direct connection to the Internet via modem, T1, ISDN line or other? If not, you will not be able to go online.
2. If you cannot connect within the player try launching your browser with using the following url: "http://www.destinyschild.com/"

Enhancing the performance of your CD EXTRA
Turn off all other programs while you are running the Enhanced CD.
This includes applications, clocks, screen savers and other software.

For more Sony Music CD EXTRA information:
internet: http://www.cdextra.com
e-mail: CD_EXTRA@sonymusic.com
Recorded Message: (212)833-6564

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EFF-089 (1/2003)